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APPENDIX.

APPLICABLE CONSTITUTIONAL PROVISION.

AMENDMENT XIV, SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES.

Amendment XIV.—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES.

1. Section 14 of Article 7 of the Illinois Election Code (Ill. Rev. Stat. 1967, Chap. 46, Sec. 7-14, p. 60, 61).

§ 7—14. State Electoral Board—Meetings—Certification of candidates

The Governor, who shall preside as chairman, the Secretary of State, who shall act as secretary, the Attorney General, the State Treasurer, the Auditor of Public Accounts and the respective chairmen of the State central committees of the 2 leading political parties shall constitute

the State Electoral Board. Not less than 61 days prior to the date of the primary the State Electoral Board shall meet in the office of the Secretary of State, at a time to be fixed by him, and shall examine all petitions filed under this Article 7, in the office of the Secretary of State, and the state Electoral Board shall then certify to the county clerk of each county, the names of all candidates for the President of the United States, and of all candidates for members of the State central committee, and of all candidates for delegates and alternate delegates to National nominating conventions, and of all candidates for nomination for all offices, as specified in the petitions for nomination on file in the office of the Secretary of State, which are to be voted for in such county, stating in such certificates the political affiliation of each candidate for nomination, or for Committeemen, as specified in the petitions. The State Electoral Board shall, in its certificate to the county clerk, certify the names of the offices, and the names of the candidates in the order in which the offices and names (except the names of candidates for State offices, for whom provision is hereinafter made), shall appear upon the primary ballot; such names (except the names of candidates for State offices), to appear in the order in which petitions have been filed in the office of the Secretary of State, except as otherwise provided in this Article.

The names of candidates for State offices shall be certified in the manner following:

The State Electoral Board shall certify to the county clerk of each county of each and every senatorial district, beginning with the first senatorial district, the names of candidates for State offices, in the order in which such names shall appear upon the official primary ballot, in each and every precinct of such senatorial district. In making its certificate to the county clerk of the county or counties in which the first senatorial district is located, the board shall certify to such county clerk, or county clerks, the

names of the offices, and the names of the candidates for such offices in alphabetical order of the first letters of the surnames of such candidates. In certifying the names of candidates for State offices to the county clerk, or county clerks of the counties composing the second senatorial district, the board shall certify the name of the candidate under each office as first which was second in the first senatorial district and the name of the candidate which was first in the first senatorial district shall be last in the second senatorial district, and the name of the candidate which was first in the second senatorial district shall be certified as last in the third senatorial district. The same procedure shall be followed by the board in certifying the names of candidates for State offices to the several county clerks of the several senatorial districts of the State, the intent being that the names of candidates for each of the State offices shall be rotated by senatorial districts.

Not less than 55 days prior to the date of the primary, the county clerk shall certify to the board of election commissioners, if there be any such board in his county, the names of all candidates so certified to him by the State Electoral Board, together with the list of the names of all other candidates in whose behalf petitions have been filed in his office, and in the order so filed. However, he shall not certify the name of any candidate for ward or township committeeman whose petition was held invalid by the hearing boards, provided in Section 7—13 of this Article. Not less than 30 days prior to the date of the primary, the city, village or incorporated town or town clerk, as the case may be, shall also certify to the board of election commissioners, the names of all candidates in whose behalf petitions have been filed in the office of such city, village or incorporated town or town clerk, as the case may be, and in the order so filed.

As amended 1967, May 1, Laws 1967, p. ——, S. B. No. 446, § 1.

2. Section 2 of Article 10 of the Illinois Election Code (Ill. Rev. Stat. 1967, Chap. 46, Sec. 10-2, pp. 388-391).

§ 10-2. "Political party" and "established party" defined —Formation of new party—Petition—Provisional organization—Committeemen

The term "political party," as hereinafter used in this Article 10, shall mean any "established political party," as hereinafter defined and shall also mean any political group which shall hereafter undertake to form an established political party in the manner provided for in this Article 10: Provided, that no political organization or group shall be qualified as a political party hereunder, or given a place on a ballot, which organization or group is associated, directly or indirectly, with Communist, Fascist, Nazi or other un-American principles and engages in activities or propaganda designed to teach subservience to the political principles and ideals of foreign nations or the overthrow by violence of the established constitutional form of government of the United States and the State of Illinois.

A political party which, at the last general election for State and county officers, polled for its candidate for Governor more than 5% of the entire vote cast for Governor, is hereby declared to be an "established political party" as to the State and as to any district or political subdivision thereof.

A political party which, at the last election in any congressional district, senatorial district, county, township, school district, park district, municipality or other district or political subdivision of the State, polled more than 5% of the entire vote cast within such congressional district, senatorial district, county, township, school district, park district, municipality, or political subdivision of the State, where such district, political subdivision or municipality, as the case may be, has voted as a unit for the election of

officers to serve the respective territorial area of such district, political subdivision or municipality, is hereby declared to be an "established political party" within the meaning of this Article as to such district, political subdivision or municipality.

Any group of persons hereafter desiring to form a new political party throughout the State, or in any political subdivision greater than a county and less than the State, shall file with the Secretary of State a petition, as hereinafter provided; and any such group of persons hereafter desiring to form a new political party, in any county shall file such petition with the county clerk; and any such group of persons hereafter desiring to form a new political party in any municipality or district less than a county shall file such petition with the clerk or Board of Election Commissioners of such municipality or district, as the case may be. Any such petition for the formation of a new political party throughout the State, or in any such district or political subdivision, as the case may be, shall declare as concisely as may be the intention of the signers thereof to form such new political party in the State, or in such district or political subdivision; shall state in not more than 5 words the name of such new political party; shall contain a complete list of candidates of such party for all offices to be filled in the State, or such district or political subdivision as the case may be, at the next ensuing election then to be held; and, if such new political party shall be formed for the entire State, shall be signed by not less than 25,000 qualified voters: Provided, that included in the aggregate total of 25,000 signatures are the signatures of 200 qualified voters from each of at least 50 counties within the State. If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who

voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area.

The filing of such petition shall constitute the said political group a new political party, for the purpose only of placing upon the ballot at such next ensuing election said list of party candidates for offices to be voted for throughout the State, or for offices to be voted for in such district or political subdivision less than the State, as the case may be under the name of and as the candidates of such new political party. If, at such ensuing election, the candidates of said new political party, or any candidate or candidates of said new political party shall receive more than 5% of all the votes cast at such election, in the State, or in any district or political subdivision of the State, as the case may be, then and in that event, such new political party shall become an established political party within the State or within such district or political subdivision less than the State, as the case may be, in which such candidate or candidates received more than 5% of the votes cast and shall thereafter nominate its candidates for public offices to be filled in the State, or such district or political subdivision of the State, as the case may be, under the provisions of the laws regulating the nomination of candidates of established political parties at primary elections and political party conventions, as now or hereafter in force.

Any such petition shall be filed at the same time and shall be subject to the same requirements and to the same provisions in respect to objections thereto and to any hearing or hearings upon such objections that are hereinafter in this Article 10 contained in regard to the nomination of any other candidate or candidates by petition. If any such new political party shall become an "established political party" in the manner herein provided, the candidate or candidates

of such new political party nominated by the petition hereinabove referred to for such initial election, shall have power to select any such party committeeman or committeemen as shall be necessary for the creation of a provisional party organization and provisional managing committee or committees for such party within the State, or in any district or political subdivision in which said new political party has become established; and said party committeeman or committeemen so selected shall constitute a provisional party organization for said new political party and shall have and exercise the powers conferred by law upon any party committeeman or committeemen to manage and control the affairs of such new political party until the next ensuing primary election at which said new political party shall be entitled to nominate and elect any party committeeman or committeemen in the State, or in such district or political subdivision under any parts of this Act relating to the organization of political parties. 1943, May 11, Laws 1943, vol. 2, p. 1, § 10-2; 1961, Aug. 1, Laws 1961, p. 2489, § 1.

3. Section 3 of Article 10 of the Illinois Election Code (Ill. Rev. Stat. 1967, Chap. 46, Sec. 10-3, pp. 393-394).

§ 10-3. Independent candidates—Nomination papers

Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; Provided, however, that included in the aggregate total of 25,000 signatures are the signatures of 200 qualified voters from each of at least 50 counties within the State. Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for

each candidate by qualified voters of such district, or political division, equaling not less than 5%, nor more than 8% of the number of persons, who voted at the next preceding general election in such district or political subdivision in which such district or political sub-division voted as a unit for the election of officers to serve its respective territorial area; provided, that the maximum number of voters signing such petition may be increased to 25 whenever such amount is greater than the 8% limit hereinabove specified. If no previous general election has been held in a library district for which nominations are being made, such nomination papers shall be signed by not less than 25 qualified voters. Each voter signing a nomination paper shall add to his signature his place of residence, and each voter may subscribe to one nomination for such office to be filled, and no more: Provided that the name of any candidate whose name may appear in any other place upon the ballot shall not be so added by petition for the same office. 1943, May 11, Laws 1943, vol. 2, p. 1, § 10-3; 1947, July 30, Laws 1947, p. 885, § 1; 1951, June 4, Laws 1951, p. 238, § 1; 1961; Aug. 15, Laws 1961, p. 3291, § 1.

4. Section 1253 of the United States Judicial Code (Title 28, U. S. C. Sec. 1253).

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 928.

5. Section 2201 of the United States Judicial Code (Title 28, U. S. C. Sec. 2201).

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85—508, § 12(p), 72 Stat. 349.

6. Section 2202 of the United States Judicial Code (Title 28, U. S. C. Sec. 2202).

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

7. Section 2281 of the United States Judicial Code (Title 28, U. S. C. Sec. 2281).

§ 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district

court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

8. Section 2284 of the United States Judicial Code (Title 28, U. S. C. Sec. 2284).

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an

interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub. L. 86-507, § 1(19), 74 Stat. 201.

RELEVANT DOCKET ENTRIES.

1. Complaint with Exhibit A attached filed August 22, 1968.
2. Notice of Motion and Motion requesting the convening of a Three-Judge Court filed August 26, 1968.
3. Order of Chief Judge William J. Campbell on August 26, 1968 continuing to September 10, 1968 Motion to advise the Chief Judge of the Court of Appeals of the Need for a Three-Judge Court.
4. Notice of Motion and Motion to Dismiss filed September 7, 1968 by defendants Adlai E. Stevenson, III and William G. Clark.
5. Order of Judge William J. Lynch on September 10, 1968 to continue cause to September 11, 1968 for oral arguments on whether the pleadings raise the necessary constitutional questions which require hearing by a Three-Judge Court.
6. Order of Judge William J. Lynch on September 11, 1968 requesting the Chief Judge of the Court of Appeals convene a Three-Judge Court.
7. Order of Chief Judge Latham Castle on September 18, 1968 designating Honorable John S. Hastings, Circuit Judge, Honorable Bernard M. Decker, District Judge and Honorable William J. Lynch, District Judge to serve as members of a Three-Judge Court.
8. Order of Judge William J. Lynch on September 18, 1968 requiring memoranda or briefs be filed with Judge Lynch's Minute Clerk not later than 4:00 P. M., September 26, 1968.
9. Notice of Motion and Motion for Preliminary Injunction filed September 20, 1968.

10. Order of William J. Lynch on September 20, 1968 filing the Motion for Preliminary Injunction.
11. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for a Preliminary Injunction filed September 26, 1968.
12. Defendants' Brief in Support of Motion to Dismiss filed September 26, 1968.
13. Order of Judges Hastings, Decker and Lynch on October 1, 1968 denying prayer for temporary injunction, denying prayer for declaratory judgment and dismissing the complaint for failure to state a cause of action.
14. Memorandum of Decision filed October 3, 1968.
15. Plaintiffs' Notice of Appeal to the Supreme Court of the United States filed October 4, 1968.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

No. 68 C 1569.

JAMES L. MOORE, A. A. RAYNER, JR., QUENTIN D. YOUNG, CLYDE EXSON, PEGGY SMITH MARTIN, DAVID R. MEADE, LUSTER H. JACKSON, LUCY MONTGOMERY, STEWART D. ROBERTS, CHARLES W. MARSHALL, MAYA FRIEDLER, DONALD W. McLEOD, FREDERICK H. ELLIS, JR., NICHOLAS N. CHERNIAVSKY, ROBERT S. EASTON, ROBERT HUNTER, DAVID E. CHRISTENSEN, PAUL RUSSELL WIGFIELD, MACK G. CROSBY, JULIA FAIRFAX, FLORENCE SOLOWAY, VIRGINIA N. BALETTO, GEORGE E. DIMITROFF, WILLIAM COUSINS, JR., WILLIAM B. McCLINTON, JR., MERRILL HARMIN,

Plaintiffs,

vs.

SAMUEL SHAPIRO, individually and as Governor of the State of Illinois, PAUL POWELL, individually and as Secretary of State of the State of Illinois, WILLIAM G. CLARK, individually and as Attorney General of the State of Illinois, ADLAI E. STEVENSON III, individually and as Treasurer of the State of Illinois, MICHAEL J. HOWLETT, individually and as Auditor of Public Accounts of the State of Illinois, JAMES A. RONAN, individually and as Chairman of the Democratic State Central Committee for the State of Illinois, and VICTOR L. SMITH, individually and as Chairman of the Republican State Central Committee for the State of Illinois,

Defendants.

COMPLAINT.

The Plaintiffs allege as follows:

1. This is an action of a civil nature brought under the Declaratory Judgment Act of the United States (Secs.

2201 and 2202 of Title 28 of the United States Code), providing for the declaration of rights and other relief.

2. This Court has original jurisdiction of this action under the provisions of Section 1343 of Title 28 of the United States Code.

3. The Plaintiffs are citizens of the United States and of the State of Illinois, residing in the State of Illinois, and are independent candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois to be voted on at the general election to be held on November 5, 1968.

4. The Defendants Shapiro, Powell, Clark, Stevenson, and Howlett are state officers of the State of Illinois, who, together with Defendants Ronan and Smith, the respective Chairmen of the Democratic and Republican State Central Committees, constitute the State Electoral Board. It is the duty of such Board under Article 10 of the Illinois Election Board to certify to the County Clerks the names of candidates entitled to appear on the official ballots, and where objections to nominating petitions are filed to pass upon the validity and sufficiency of the nominating petitions. The State Electoral Board is constituted under Article 7 of the Illinois Election Code.

5. Plaintiffs have had printed petitions for their nomination as independent candidates for the offices of Presidential Electors which were circulated in order to obtain not less than 25,000 signatures of qualified voters in the State of Illinois. Such petitions, containing the names of not less than 26,500 qualified voters who desire to have plaintiffs nominated as independent candidates for the offices of Presidential Electors were filed by Plaintiffs with the Defendants, who constitute the State Electoral Board, on August 5, 1968.

6. In order to qualify as independent candidates for the

offices of Presidential Electors to be voted on at the November 5, 1968 general election, Plaintiffs must comply with the provisions of Article 10 of the Illinois Election Code, and particularly Section 3 thereof. Among other things, they were required to file on or before August 5, 1968, nomination petitions bearing the signatures of 25,000 qualified voters. Included in the total of 25,000 must be the signatures of not less than 200 qualified voters from each of at least 50 of the 102 counties in the State of Illinois. The provision of Section 3 of Article 10 of the Illinois Election Code requiring at least two hundred (200) valid signatures from each of fifty (50) counties was added by amendment in 1935, the previous requirement being only a total of 25,000 valid signatures.

7. On August 16, 1968, the State Electoral Board met and determined that Plaintiffs' petitions were insufficient for the sole reason that the requirement of 200 signatures from each of not less than fifty (50) counties had not been met. A copy of the Board's determination is attached hereto and made a part hereof as Exhibit A.

8. This provision of Section 3 of Article 10 of the Illinois Election Code added by amendment in 1935, requiring at least 200 signatures from each of not less than 50 counties, in view of the marked disparity in the population of the 102 counties of the State of Illinois, is unconstitutional as constituting an arbitrary, unreasonable, and discriminatory restriction on the right of qualified voters of the State of Illinois to nominate and vote for independent candidates of their own choice, in violation of the United States Constitution.

9. Although more than half the total population and more than half the registered voters of the State of Illinois reside in one county, Cook County, this provision of Section 3 of Article 10 of the Illinois Election Code added by amendment in 1935 prevents qualified voters in Cook

County from nominating independent candidates for statewide office, including Presidential Electors.

10. This provision of Section 3 of Article 10 of the Illinois Election Code added by amendment in 1935 prevents 61 per cent of the State's registered voters who reside in Cook, Du Page, Lake, Madison, and St. Clair Counties, the five most populous counties of the State of Illinois, from nominating independent candidates for statewide office, including Presidential Electors.

11. This provision of Section 3 of Article 10 of the Illinois Election Code added by amendment in 1935 prevents 93.4 per cent of the State's registered voters who reside in Cook, Du Page, Lake, Madison, St. Clair, Adams, Bureau, Champaign, Christian, Clinton, Coles, DeKalb, Franklin, Fulton, Hancock, Henry, Iroquois, Jackson, Jefferson, Kane, Kankakee, Knox, La Salle, Lee, Livingston, Logan, Macon, Macoupin, Marion, McDonough, McHenry, McLean, Montgomery, Morgan, Ogle, Peoria, Randolph, Rock Island, Saline, Sangamon, Shelby, Stephenson, Tazewell, Vermillion, Whiteside, Will, Williamson, Winnebago and Woodford, the forty-nine most populous counties of the State of Illinois, from nominating independent candidates for statewide office, including Presidential Electors.

12. This provision of Section 3 of Article 10 of the Illinois Election Code added by amendment in 1935 would permit 25,000 qualified voters properly distributed among at least 50 of the 53 least populous counties of the State of Illinois to nominate independent candidates for statewide office in the State of Illinois, despite the fact that said 53 counties contain only 6.6 per cent of the registered voters of the entire State.

13. This provision of Section 3 of Article 10 of the Illinois Election Code added by amendment in 1935 is unconstitutional, being in violation of Amendment XIV

to the United States Constitution, particularly the privileges and immunities, equal protection of the laws, and due process clauses, and its enforcement should therefore be enjoined.

14. Apart from this provision of Section 3 of Article 10 of the Illinois Election Code requiring at least two hundred (200) valid signatures from each of fifty (50) counties, the Defendants, and each of them, would have been required by statute to perform their official duties of certifying to the County Clerks for purposes of the November 5, 1968 general election the names of independent candidates for statewide office, including independent candidates for the offices of Presidential Electors, who filed proper nominating petitions containing the signatures of 25,000 qualified voters.

15. Apart from the provision of Section 3 of Article 10 of the Illinois Election Code requiring at least two hundred (200) valid signatures from each of fifty (50) counties, the Plaintiffs, by complying with all other and valid provisions of the Election Code, would be entitled to have their names certified to the County Clerks for the November 5, 1968 general election as independent candidates for the offices of Electors of President and Vice-President of the United States.

16. By reason of the provision of Section 3 of Article 10 of the Illinois Election Code requiring at least two hundred (200) valid signatures from each of fifty (50) counties, the Plaintiffs are threatened with the deprivation of valuable rights guaranteed by the United States Constitution.

17. Unless this Court grants promptly the declaratory and equitable relief herein requested, the constitutional rights of Plaintiffs may be completely frustrated and destroyed, and Plaintiffs have no adequate remedy at law.

18. Inasmuch as the date of the general election concerning which Plaintiffs' rights will be jeopardized, November 5, 1968, is only about two and one-half months distant, an emergency exists requiring the earliest possible consideration and determination of the important constitutional issues presented by this Complaint, an emergency, which, by involving the right to nominate and vote for candidates for a Federal office, is of paramount interest and importance to every citizen of the United States residing in the State of Illinois.

Prayer for Relief.

Wherefore, Plaintiffs respectfully pray that this Court take and assume jurisdiction of this action and of the subject matter thereof and of the legal controversies presented by this Complaint; and that, after hearing, the Court by Declaratory Judgment or Decree declare the rights and other legal relations of the Plaintiffs with respect to the matters pleaded above as authorized by Sec. 2201 of the Judicial Code.

And particularly Plaintiffs pray that this Court enter a Declaratory Judgment holding and declaring that the provision of Section 3 of Article 10 of the Illinois Election Code added by amendment in 1935 requiring for a valid nomination petition at least two hundred (200) signatures of qualified voters from each of at least fifty (50) counties is unconstitutional in violation of the United States Constitution, and particularly in violation of Amendment XIV, by reason of constituting an arbitrary, unreasonable and discriminatory restriction on the right of qualified voters of the State of Illinois to nominate and vote for candidates of their own choice, and is therefore null and void and of no effect; holding and declaring that the decision of the State Electoral Board with respect to the insuffi-

ciency of the nomination papers Plaintiffs have filed based upon said unconstitutional provision of Section 3 of Article 10 of the Illinois Election Code is null and void and of no effect; and holding and declaring that the nominating papers of Plaintiffs, duly signed by at least 25,000 qualified voters of the State of Illinois, are valid and sufficient at law to nominate Plaintiffs as independent candidates for the offices of electors of President and Vice-President of the United States from the State of Illinois to be voted on throughout the State of Illinois at the general election to be held on November 5, 1968, and to have their names certified to the County Clerks for such purpose.

And Plaintiffs respectfully pray that this Court, after a hearing, grant further relief, as authorized by Sec. 2202 of the Judicial Code, by way of an order or decree, enjoining the Defendants and each of them, their agents, deputies, and assistants, and their successors in office, from declining or refusing to certify to the County Clerks throughout the State of Illinois for purposes of the November 5, 1968 general election the names of the Plaintiffs as independent candidates for the offices of electors of President and Vice-President of the United States from the State of Illinois in accordance with the applicable provisions of the Illinois Election Code.

And Plaintiffs further pray that this Court grant such other and additional relief as may be just and proper.

REQUEST FOR THREE-JUDGE COURT.

By virtue of the fact that Plaintiffs are asking that the enforcement of a state statute be enjoined on the ground that that statute is unconstitutional, Plaintiffs request that a three-judge court be convened at the earliest possible opportunity to hear this cause, pursuant to Sections 2281 and 2284 of the Judicial Code.

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RICHARD L. MANDEL,
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EXHIBIT A

State Electoral Board Meeting
August 16, 1968

Petition of Nomination of Independent Candidates for the Offices of Electors of President and Vice President of the United States from the State of Illinois

The statutory provision of Chapter 46, Section 10-3, nomination of independent candidates to be filled by the voters of the State at large, the petition signature requirements are as follows: "* * 25,000 signatures, 200 qualified voters from each of at least 50 counties within State * *."

Upon examining said petition to see if it meets the statutory requirements, it is noted that said petition does not contain signatures of 200 qualified voters from each of at least 50 counties within the State. Said petition only contains 24 counties with over 200 signatures.

Therefore, said petition does not meet with the requirements of Section 10-3 as set out above and is not in apparent conformity with the provisions of the Election Code, and, we order that the following set of Electors of President and Vice President of the United States from the State of Illinois, not be certified to the county clerks for the November 5, 1968 General Election.

Name, Address

A. A. Rayner, Jr., 318 E. 71st Street, Chicago, Illinois
Quentin D. Young, 1418 E. 55th Street, Chicago, Illinois
Clyde Exson, 1152 W. Marquette Road, Chicago, Illinois
Peggy Smith Martin, 6810 S. Loomis Boulevard, Chicago, Illinois
David R. Meade, 4142 Rose Avenue, Western Springs, Illinois
Luster H. Jackson, 3450 W. Jackson Boulevard, Chicago, Illinois
Lucy Montgomery, 1000 N. Lake Shore Plaza, Chicago, Illinois
Stewart D. Roberts, 520 N. East Avenue, Oak Park, Illinois
Charles W. Marshall, 4933 Jerome Street, Skokie, Illinois
Maya Friedler, 610 Forest Avenue, Evanston, Illinois
Donald W. McLeod, 6204 Fairmount Avenue, Downers Grove, Illinois
Frederick H. Ellis, Jr., 1173 W. Stephenson Street, Freeport, Illinois
Nicholas N. Cherniavsky, 7704 Randy Road, Rockford, Illinois
Robert S. Easton, 418 E. High Point Road, Peoria, Illinois
Robert Hunter, Route 1, Makanda, Illinois
David E. Christensen, 908 Glenview Drive, Carbondale, Illinois

Paul Russell Wigfield, 87 Thomas Terrace, Edwardsville, Illinois
James L. Moore, 3435 S. Paulina Street, Chicago, Illinois
Mack G. Crosby, 5000 S. Wells Street, Chicago, Illinois
Julia Fairfax, 121 S. Central Park Boulevard, Chicago, Illinois
Florence Soloway, 6 Warwick Court, Park Forest, Illinois
Virginia N. Baletto, 8817 S. Ada Street, Chicago, Illinois
George E. Dimitroff, 1866 Indiana Drive, Galesburg, Illinois
William Cousins, Jr., 1745 E. 83rd Place, Chicago, Illinois
William B. McClinton, Jr., 833 W. Buena Avenue, Apt. 703, Chicago, Illinois
Merrill Harmin, Route 5, Box 147A, Edwardsville, Illinois

Done at Springfield, this 16th day of August, A. D. 1968.

STATE ELECTORAL BOARD,
/s/ SAMUEL H. SHAPIRO,
Governor, Chairman.

/s/ PAUL POWELL,
Secretary of State, Secretary.

/s/ WILLIAM G. CLARK,
Attorney General.

/s/ ADLAI E. STEVENSON, III,
State Treasurer.

/s/ MICHAEL J. HOWLETT,
Auditor of Public Accounts.

/s/ JAMES A. RONAN,
Chairman of State Central Committee, Democratic Party.

/s/ VICTOR L. SMITH,
Chairman of State Central Committee, Republican Party.

(Jurat and affidavit of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois.

(Title omitted in printing.)

NOTICE OF MOTION.

Hon. Samuel Shapiro,
160 North La Salle Street,
Chicago, Illinois,
Hon. Paul Powell,
188 West Randolph Street,
Chicago, Illinois,
Hon. Michael J. Howlett,
160 North La Salle Street,
Chicago, Illinois,
Hon. William G. Clark,
160 North La Salle Street,
Chicago, Illinois,
Hon. Adlai E. Stevenson, III,
160 North La Salle Street,
Chicago, Illinois,
Mr. James A. Ronan,
77 West Washington Street,
Chicago, Illinois,
Mr. Victor L. Smith,
105 West Madison Street,
Chicago, Illinois.

Please take notice that the undersigned shall on August 26, 1968 at the hour of 10:00 A. M. or as soon thereafter as counsel may be heard, appear before The Honorable Edwin A. Robson, Room 2346, U. S. Courthouse and Federal Office Building, Chicago, Illinois, or such other judge who may be sitting in his place and stead, and then and there present the attached motion.

RICHARD F. WATT,
One of Plaintiff's Attorneys.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

MOTION.

Plaintiffs, by and through their attorneys, Richard F. Watt, Sheli Z. Rosenberg, Richard C. Mandel, hereby request that this Court promptly advise the Chief Judge of the Court of Appeals for the Seventh Circuit of the application for injunctive relief set forth in the Complaint, to the end that a three-judge court be convened at the earliest possible opportunity to hear this cause pursuant to Sections 2281 and 2284 of the Judicial Code.

RICHARD F. WATT,
SHELI Z. ROSENBERG,
RICHARD L. MANDEL,
By /s/ RICHARD F. WATT,
Their Attorneys.

RICHARD F. WATT,
SHELI Z. ROSENBERG,
105 West Adams Street,
Chicago, Illinois 60603,

RICHARD L. MANDEL,
Ten South La Salle Street,
Chicago, Illinois 60603.

(Affidavit of service omitted in printing.)

UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

Name of Presiding Judge, Honorable William J. Campbell, Chief Judge.

No. 68 C 1569 Date August 26, 1968

Title of Cause

Moore *vs.* Shapiro, et al.

Brief Statement of Motion

That the Chief Judge of the Court of Appeals for the Seventh Circuit be promptly advised of the application for injunctive relief set out in the Complaint so that a three-judge court can be convened.

Names and Addresses of moving counsel

Richard F. Watt and Sheli Z. Rosenberg,
105 West Adams Street,
Plaintiffs.

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Defendants:

Hon. Samuel Shapiro, Governor,
160 North La Salle Street,

Hon. Paul Powell, Secretary of State,
188 West Randolph Street,

Hon. Michael J. Howlett, Auditor of Pub. Accounts,
160 North La Salle Street,

Hon. Adlai E. Stevenson, III, State Treasurer,
160 North La Salle Street,

Mr. James A. Ronan,
77 West Washington Street,

Mr. Victor L. Smith,
105 West Madison St.

Motion to advise the Chief Judge of the Court of Appeals is continued to September 10, 1968 before Judge Lynch.

W. J. C.

UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

NOTICE OF MOTION.

To: Richard F. Watt and Sheli Z. Rosenberg
105 W. Adams Street
Chicago, Illinois

Richard L. Mandel
10 S. LaSalle Street
Chicago, Illinois

Please take Notice that the undersigned will bring the Motion set forth below on for hearing before the Honorable William J. Lynch, District Judge, or such other judge as may be sitting in his place, in the courtroom usually occupied by him in the Federal Building, Chicago, Illinois, on the 10th day of September, 1968, at 10:00 A.M., or as soon thereafter as counsel can be heard.

MOTION.

Defendants Adlai Stevenson, III, as Treasurer of the State of Illinois and William G. Clark, as Attorney General of the State of Illinois, by William G. Clark, Attorney General, move the Court to dismiss the action for the reason that the complaint fails to state a claim against defendants upon which relief can be granted.

WILLIAM G. CLARK,
Attorney General of
the State of Illinois,
160 N. LaSalle Street,
Chicago, Illinois 60601,
346-2000.

THOMAS E. BRANNIGAN,
Assistant Attorney General,
Of Counsel.

(Certificate of Service omitted in printing.)

UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

Name of Presiding Judge, Honorable William J. Lynch.

Cause No. 68-C-1569 Date Sep. 10, 1968

Title of Cause

Moore v. Shapiro, et al.

Brief Statement of Motion

That the Chief Judge of the Circuit be promptly advised of the application for injunctive Relief so 3-Judge Court can be Convened.

Names and Addresses of moving counsel

Richard F. Watt and Sheli Z. Rosenberg—105 W. Adams St.

Order cause cont'd to Sept. 11, 1968, 9:30 A.M. for arguments on whether the pleadings raise the kind of constitutional questions which require hearing by a Three-Judge Court.

Sep 10 1968—WJL

UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

Name of Presiding Judge, Honorable William J. Lynch.

Cause No. 68-C-1569 Date Sept. 11, 1968

Title of Cause

Moore, et al. v. Shapiro, et al.

Brief Statement of Motion

Hearing Re: Convening of 3-Judge Court and Defendants' Motion to Dismiss

Names and Addresses of moving counsel

Wm. G. Clark (Brannigan), Attorney General, 160 N. LaSalle St., Chicago., Ill.
Representing Rep. certain defendants.

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Richard F. Watt and Sheli Z. Rosenberg, 105 W. Adams, Chicago, Ill.
Rep. certain plaintiffs Richard L. Mandel, 10 So. LaSalle, Chicago, Ill.
Rep. certain plaintiffs.

Arg'ts heard and concluded. Order Motion to request the Chief Judge of the Circuit to convene a Three-Judge Court granted.

WJL

UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

The undersigned, Chief Judge of the Seventh Circuit, having been notified by the Honorable William J. Lynch, United States District Judge for the Northern District of Illinois, of the filing of the above entitled cause, does hereby, pursuant to Title 28, U. S. C. § 2284, designate the

HONORABLE JOHN S. HASTINGS

a United States Circuit Judge for the Seventh Judicial Circuit, and the

HONORABLE BERNARD M. DECKER

a United States District Judge for the Northern District of Illinois, to serve with the

HONORABLE WILLIAM J. LYNCH

as members of a three-judge United States District Court to hear and determine the above entitled action or proceeding.

Dated this 12th day of September, 1968.

LATHAM CASTLE,
Chief Judge of the Seventh Circuit.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois.

(Title omitted in printing.)

ORDER.

Memoranda or briefs of law in the above entitled cause are to be filed by the parties with Judge Lynch's Minute Clerk not later than 4:00 P.M. on September 26, 1968.

ENTER:

WILLIAM J. LYNCH,
Judge.

Dated—September 18, 1968.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois.

(Title omitted in printing.)

NOTICE OF MOTION.

To: Hon. Samuel Shapiro
160 North LaSalle Street
Chicago, Illinois

Hon. Paul Powell
188 West Randolph Street
Chicago, Illinois

Hon. Michael J. Howlett
160 North LaSalle Street
Chicago, Illinois

Mr. James A. Ronan
77 West Washington Street
Chicago, Illinois

Mr. Victor L. Smith
105 West Madison Street
Chicago, Illinois

Hon. William G. Clark
Attorney for William G. Clark
Attorney General and

Hon. Adlai E. Stevenson, III
160 North LaSalle Street
Chicago, Illinois

Please take notice that the undersigned shall on September 20, 1968 at the hour of 10:00 A. M., or as soon thereafter as counsel may be heard, appear before The Honor-

able William J. Lynch, Room 1919, U. S. Courthouse and Federal Office Building, Chicago, Illinois, or such other judge who may be sitting in his place and stead, and then and there present the attached motion.

/s/ RICHARD L. MANDEL,
One of Plaintiff's Attorneys.

RICHARD F. WATT,
SHELI Z. ROSENBERG,
105 West Adams Street,
Chicago, Illinois 60603.

RICHARD L. MANDEL,
10 South LaSalle Street,
Chicago, Illinois 60603.

UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

MOTION FOR PRELIMINARY INJUNCTION.

Now come Plaintiffs in the above entitled action, by their attorneys, and move the court for the entry of a preliminary injunction and temporary relief enjoining the Defendants and each of them, their agents, deputies, and assistants, and their successors in office as follows:

1. From declining or refusing to certify to the County Clerks throughout the State of Illinois for purposes of the November 5, 1968 general election the names of the Plaintiffs, as independent candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois, or the names of Plaintiffs' candidates for the offices of President and Vice-President of the United States, in accordance with the applicable provisions of the Illinois Election Code;

2. To certify to the County Clerks throughout the State of Illinois the names of Plaintiffs as independent candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois, or the names of Plaintiffs' candidates for the offices of President and Vice-President of the United States, and

3. To take such other action as shall be necessary to insure the names of the Plaintiffs as independent candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois, or the names of Plaintiffs' candidates for the offices of President and Vice-President of the United States, shall be listed

on all ballots and voting machines for purposes of the general election to be held on November 5, 1968.

RICHARD F. WATT,
SHELI Z. ROSENBERG,
RICHARD L. MANDEL,
IRA A. KIPNIS,
By RICHARD L. MANDEL,
Attorneys for Plaintiffs.

(Affidavit of service omitted in printing.)

UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

Name of Presiding Judge, Honorable William J. Lynch

Cause No. 68 C 1569 Date September 20, 1968

Title of Cause

Moore et al. v. Shapiro et al.

Brief Statement of Motion

Motion for Preliminary Injunction

Names and Addresses of moving counsel and the parties they represent

Ira Kipnis, 10 South LaSalle Street, Chicago; Richard Mandel, 10 South LaSalle Street, Chicago; Richard F. Watt and Sheli Z. Rosenberg, 105 West Adams Street, Chicago,

Representing plaintiffs.

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Attorney General William F. Clark, 160 North LaSalle Street, Chicago, Illinois,

Representing certain defendants.

Motion for Preliminary Injunction filed.

J. L.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

(Title omitted in printing.)

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION.

STATEMENT OF THE CASE.

This is a suit for Declaratory Judgment under Section 2201 of the Judicial Code and for injunctive relief as authorized by Section 2202 of the Judicial Code brought by twenty-six independent candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois against the members of the State of Illinois Electoral Board.

Electors of President and Vice-President of the United States are to be voted on at the General Election to be held on November 5, 1968. On August 5, 1968, pursuant to Article 10 of the Illinois Election Code, Plaintiffs filed petitions with Defendants containing the names of 26,500 qualified voters who desired to have Plaintiffs nominated as independent candidates for the offices of Presidential Electors. Prior to 1935, Section 3 of said Article 10 required that at least 25,000 electors sign a petition to nominate such candidates. In 1935 that statute was amended. The requirement of at least 25,000 signatures was retained, but the following proviso was added:

> "Provided, that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties." (Ill. Rev. Stat. 1967, Chap. 46, sec. 10-3).

This section provides the only means whereby qualified voters in Illinois can nominate independent candidates for statewide office. An identical place of residence requirement is contained in Section 2 of Article 10 with respect to nominating candidates of a new political party for statewide office.

On August 16, 1968, Defendants ordered that Plaintiffs not be certified to the county clerks for the November 5, 1968 General Election on the sole ground that the petition

> "does not contain signatures of 200 qualified voters from each of at least 50 counties within the State. Said petition only contains 24 counties with over 200 signatures. Therefore, said petition does not meet with the requirements of Section 10-3. . . ." (Exhibit A of Complaint.)

On August 22, 1968, the Complaint in this cause was filed and assigned to Judge William J. Lynch. The Complaint prays for a Declaratory Judgment holding and declaring that the amendment to Section 3 of Article 10 requiring 200 signatures from each of at least 50 counties is unconstitutional in violation of the Fourteenth Amendment to the United States Constitution and holding and declaring that the decision of the State Electoral Board with respect to the insufficiency of the nominating petitions is null and void, and that such petitions are valid and sufficient at law to have Plaintiffs' names certified to the county clerks as candidates for the offices of Electors of President and Vice-President. The Complaint further prays for a decree, under Section 2202 of the Judicial Code, enjoining defendants from refusing to certify plaintiffs to the county clerks for such purpose. Finally, the Complaint requested that a three-judge court be convened at the earliest possible opportunity pursuant to Sections 2281 and 2284 of the Judicial Code since Plaintiffs are asking that enforcement of a state statute be enjoined.

On August 26, 1968, pursuant to notice of motion mailed to defendants on August 22, attorneys for Plaintiffs appeared before Chief Judge William J. Campbell, who was hearing emergency motions, and moved that the District Court advise the Chief Judge of the Court of Appeals for the Seventh Circuit of said application for injunctive relief to the end that a three court judge be convened pursuant to Sections 2281 and 2284 of the Judicial Code. Chief Judge Campbell declined to grant relief and set the motion down for hearing before Judge Lynch fifteen days thereafter on September 10. Judge Lynch heard and granted the motion on September 11.

A preliminary injunction is sought because of the relatively short time remaining before the General Election and because time must be allowed for printing the ballots.

ARGUMENT.

I.

The District Court has jurisdiction of this cause and has the authority to grant the declaratory and injunctive relief prayed for in the complaint.

The District Court has jurisdiction of this cause under Section 1343 of the Judicial Code which gives it original jurisdiction of any civil action:

> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Under this provision, allegation and proof of jurisdictional amount are not necessary. *Hague* v. *C. I. O.*, 307 U. S. 496, 506-13 (1939).

Plaintiffs' cause of action arises primarily under the equal protection of the laws clause of the Fourteenth Amendment to the United States Constitution. Defendants are acting under color of the 1935 amendment to Section 3 of Article 10 of the Illinois Election Code.

The Complaint states a cause of action of a civil nature under the Declaratory Judgment Act, Section 2201 of the Judicial Code which empowers any court of the United States:

> "In cases of actual controversy within its jurisdiction . . . (to) declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought."

The District Court is authorized to grant the injunctive relief prayed for in the Complaint by Section 2202 of the Judicial Code which provides:

> "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

The Complaint presents an actual controversy between Plaintiffs who seek to be certified to the county clerks so that their names will appear on the ballot for the November 5, 1968 General Election and Defendants who refuse to do so under a provision of the Illinois Election Code which Plaintiffs contend is unconstitutional.

The cases of *Baker* v. *Carr*, 369 U. S. 186 (1962), *Gray* v. *Sanders*, 372 U. S. 368 (1963) and *Reynolds* v. *Sims*, 377 U. S. 533 (1964), as well as the many election cases which have followed, have settled that this Court has juris-

diction of a suit such as this which attacks state statutes as unconstitutional on the ground that it deprives persons of equal protection of the laws by debasing and diluting their right to nominate and vote; that such suits state a justiciable cause of action; that persons such as Plaintiffs have standing in such suits to challenge state statutes as unconstitutional for violating the Fourteenth Amendment; and that declaratory and injunctive relief are appropriate remedies in such suits.

II.

The 1935 amendment to Section 3 of Article 10 of the Election Code requiring 200 signatures from each of 50 counties constitutes an arbitrary, unreasonable, and discriminatory restriction on the right of Illinois voters to nominate and vote for candidates of their own choice.

This requirement was added by amendment in 1935. *Laws*, 1935, p. 789. Before that amendment, the signatures required to nominate independent candidates for statewide offices, and for presidential electors, were counted on a statewide basis and only in terms of the total to be obtained: 25,000 signatures of qualified voters in the state. The requirement for nominating candidates for a new political party was identical.

The 1935 amendment added an additional and weighted requirement based on the place of residence of the registered voters. The 1935 amendment made it mandatory that the 25,000 registered voters meet a further, and, in view of the population distribution in Illinois, highly unequal requirement as to their place of residence within the statewide geographical unit for which candidates were to be elected. The 25,000 signatures must include those of at least 200 registered voters from each of 50 counties. In

other words, under the 1935 amendment, the signatures of neither 25,000 registered voters nor of 4,000,000 registered voters will satisfy the statutory requirement for nomination of independent or new-party candidates unless they meet place of residence requirements contrary to the population-based requirements of the Fourteenth Amendment.

The distribution of population among the 102 Illinois counties shows the extent to which the 1935 amendment debases and dilutes the right of qualified voters to participate in the electoral process.

More than 50 per cent of the total Illinois population and more than 50 per cent of the Illinois registered voters reside in *one* county, Cook County.

Approximately 61 per cent of the Illinois registered voters reside in the state's *five* most populous counties: Cook, DuPage, Lake, Madison, and St. Clair.

Approximately 93.4 per cent of the Illinois registered voters reside in the state's forty-nine most populous counties: Cook, DuPage, Lake, Madison, St. Clair, Adams, Bureau, Champaign, Christian, Clinton, Coles, DeKalb, Franklin, Fulton, Hancock, Henry, Iroquois, Jackson, Jefferson, Kane, Kankakee, Knox, La Salle, Lee, Livingston, Logan, Macon, Macoupin, Marion, McDonough, McHenry, McLean, Montgomery, Morgan, Ogle, Peoria, Randolph, Rock Island, Saline, Sangamon, Shelby, Stephenson, Tazewell, Vermillion, Whiteside, Will, Williamson, Winnebago, and Woodford.

Approximately 6.6 per cent of Illinois registered voters reside in the *fifty-three* remaining counties.

The 1935 amendment thus prevents the majority of the state's registered voters who reside in Cook County from nominating independent candidates for Presidential Electors and statewide offices or from forming a new political party in the state for those purposes.

The 1935 amendment also prevents the 61 per cent of

the state's registered voters who reside in Cook, DuPage, Lake, Madison, and St. Clair Counties from nominating independent candidates for Presidential Electors and statewide offices or from forming a new political party in the state for those purposes.

The 1935 amendment even prevents the 93.4 per cent of the state's registered voters who reside in the state's forty-nine most populous counties from nominating independent candidates for Presidential Electors and statewide offices.

But the 1935 amendment permits 25,000 of the remaining 6.6 per cent of the registered voters properly distributed among fifty of the fifty-three least populous counties to nominate such candidates or to form such a new party.

The effect of the 1935 amendment is drastically to debase the weight of a qualified voter in a populous county as against the weight of a qualified voter in the less populated counties. No number of additional signatures over and above the required 200 in a populous county can overcome the lack of 200 in one of the less populated counties. One qualified voter does not have the same right to nominate as every other qualified voter. His signature on a nominating petition counts only if he resides in the right county. And the smaller the population of the county in which he resides, the more his signature counts.

The grotesque nature of the 1935 amendment to Article 10 of the Illinois Election Code is illustrated by the fact that the voters of Cook County, since they outnumber the voters of all the rest of the state put together, could elect the Presidential Electors, a United States Senator, and various statewide officers in the face of the united opposition of the voters of the other 101 counties. Indeed, that possibility is required by the Fourteenth Amendment to the United States Constitution.

Nevertheless, although that majority can elect, under the

Illinois Election Code it cannot nominate. Although the minority cannot elect, it can nominate.

In fact, the majority cannot really elect in Illinois. The power of a majority to elect must mean the power to elect candidates of its and not the minority's choice. Since the majority cannot nominate candidates without the support of the minority, it can only elect candidates the minority has also agreed to choose.

It is clear, therefore, that the 1935 amendment to Article 10 of the Illinois Election Code heavily overweights the electoral power of voters residing in less populous counties and greatly underweighs the electoral power of voters residing in the populous counties. The 1935 amendment deviates drastically from the rule of one man, one vote.

III.

The 1935 amendment to Section 3 of Article 10 of the Illinois Election Code violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The facts presented in the instant case are virtually identical to those present in the 1948 case of *MacDougall* v. *Green*, 335 U. S. 281. The facts vary only in that in 1948 the five most populous Illinois counties had 59 per cent of the registered voters; in 1968 they had 61 per cent. In 1948 the forty-nine most populous counties had 87 per cent of the registered voters; in 1968 they had 93.4 per cent. As in the instant case, plaintiffs in the *MacDougall* case were seeking to be certified to the county clerks for a Federal and statewide election without obtaining 200 signatures from each of 50 counties as required by the 1935 amendment to Article 10 of the Illinois Election Code. In the twenty years since the *MacDougall* case, however, the law has changed considerably.

The Supreme Court in the *MacDougall* case, by a vote of six to three, affirmed the District Court's denial of an interlocutory injunction and dismissal of the complaint on the basis of *Colegrove* v. *Green,* 328 U. S. 549 (1946) and *Colegrove* v. *Barrett,* 330 U. S. 804 (1946). Justice Rutledge concurred with the majority on the ground that the Court should decline to exercise its jurisdiction in equity. Justice Douglas, with whom Justices Black and Murphy concurred, dissented and, as noted below, the statement of the law urged in that dissent is now the law of the land.

It may be that Justice Frankfurter's opinion at page 554 in the 1946 *Colegrove* case that judicial enforcement of equality of voting power would constitute "pernicious . . . judicial intervention in an essentially political contest dressed up in the abstract phrases of the law" actually stated the ruling of that case. If it did, the Supreme Court, in the 1962 case of *Baker* v. *Carr, supra,* drastically changed the focus for viewing cases which involve political issues. The question in such cases, said the Court at page 226, "is the consistency of state action with the Federal Constitution." The Court held that complainant's allegation that the state's apportionment act resulted in a classification of voters which favored those in some counties over others presented a justiciable cause of action under the equal protection clause of the Fourteenth Amendment.

Since the *Baker* decision, the Supreme Court and many District Courts have held numerous state statutes which classified voters and weighted votes on the basis of place of residence for purposes of nomination or election to be unconstitutional, enjoined their enforcement, and ordered elections consistent with the principle of one man, one vote. (See Annotation, "Inequalities In Population Of Election Districts Or Voting Units As Rendering Apportionment Unconstitutional, 12 L. ed. 2d 1282).

In *Reynolds* v. *Sims,* 377 U. S. 533 (1964), the Court

affirmed the holding of a three-judge court that the existing and proposed apportionment provisions for the Alabama legislature were unconstitutional because they conflicted with the equal protection clause of the Fourteenth Amendment, and affirmed its order for a temporary reapportionment. The existing and proposed statutes apportioned state representatives and senators among districts and counties so that voters in the more populous counties did not elect their proportionate share of representatives and senators. The Court stated at p. 555:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

The Court dealt squarely with the unconstitutionality of place of residence requirements such as that of the 1935 amendment to the Illinois Election Code. "Diluting the weight of votes because of place of residence," the Court said at page 566, "impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race. . . ." Not place of residence but "population," the Court held at page 567, "is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies."

The Court left no doubt as to how the issues in *MacDougall* v. *Green, supra,* were to be decided under the laws as stated in the *Reynolds* case. In footnote 40 at page 563 in the *Reynolds'* case, the Court quoted as follows from Justice Douglas's dissent in the *MacDougall* case:

> "(A) regulation . . . (which) discriminates against the residents of the populous counties of the state in favor of rural sections . . . lacks the equality to which

the exercise of political rights is entitled under the Fourteenth Amendment.

"Free and honest elections are the very foundation of our republican form of government. . . . Discrimination against any group or class of citizens in the exercise of these constitutionally protected rights of citizenship deprives the electoral process of integrity. . . .

"None would deny that a state law giving some citizens twice the vote of other citizens in either the primary or general election would lack that equality which the Fourteenth Amendment guarantees. . . . The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government."

In *Gray* v. *Sanders,* 372 U. S. 368 (1963), the Court held that the Georgia county unit system in statewide primary elections was unconstitutional since it resulted in a dilution of the weight of some votes merely because of where the voters resided. The Court said at pages 557-58:

"How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or in the smallest rural county. Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment."

Here, the geographical unit chosen for nomination and election of Presidential Electors is the State of Illinois. All registered voters must have equal power to nominate and elect, "wherever their home may be in the geographical unit."

During the oral argument on apportionment of a three-judge court before Judge Lynch in the instant case, counsel for Defendants attempted to distinguish the veritable avalanche of decisions which have followed the *Baker* and *Reynolds* cases by arguing that the instant case involved merely the question of getting on the ballot, not an actual election. He suggested that the 1935 amendment could not be unconstitutional under the equal protection clause of the Fourteenth Amendment because voters for the independent candidates could write in the candidates' names. Apparently, a law restricting the names which appear on the ballots to candidates of either the Democratic or Republican party also could not be unconstitutional under the equal protection clause since the names of any other candidates could be written in at the election.

Such a contention, however, does not have to be attacked solely on the ground of absurdity. Article 10 of the Illinois Election Code contains the only procedure for the nomination of candidates by voters who are not members of established political parties. It permits the forming of new parties and the nomination of independent candidates by nominating petitions. Under the Illinois Election Code the procedure of nominating by petition under Article 10 is as much an integral part of the whole elective system as are the primary provisions for established parties set out in Articles 7, 8, and 9.

The Illinois Supreme Court has recognized explicitly the role of the nominating process in the elective process. In *People* v. *Election Commissioners,* 221 Ill. 9, 18 (1906), the Court stated unequivocally:

> "The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen, *and is of precisely the same nature.*" (Emphasis added.)

Similarly, in *The People* v. *Fox,* 294 Ill. 263 (1920), the Illinois Supreme Court held the Primary Act of 1919 unconstitutional as contrary to Section 18 of Article II of the Illinois Constitution, saying at page 268:

> "Section 18 of the bill of rights provides that all elections shall be free and equal. This language has been construed by this court as meaning that the vote of every qualified elector shall be equal in its influence with every other one. . . . It is well settled in this state that the term 'election' applies to a primary for the nomination of candidates as well as to the election of such candidates to office, and the right to choose candidates for public office, whose names are to be placed on the official ballot, has been held as valuable as the right to vote for them after they are chosen and is of precisely the same nature."

It is well settled that where a party primary is an integral part of the procedure of election, the right to vote in a primary is a right protected by the United States Constitution. *United States* v. *Classic,* 313 U. S. 299, 314, 318 (1941). In *Smith* v. *Allwright,* 321 U. S. 649, 664 (1944), the Court stated:

> "When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election."

Following *Baker* v. *Carr, supra,* the Court has applied the same tests to determine the character of discrimination or abridgement in statutes governing the nomination of candidates as in their election. As already noted, *Gray* v. *Sanders, supra,* found unconstitutional a county unit system in statewide primary elections. The Court there held at pages 374-75 that "state regulation of this preliminary phase of the election process makes it state action" within the meaning of the Fourteenth Amendment. In *Toombs*

v. *Fortson,* 205 F. Supp. 248 (DC Ga., 1962), the Court held unconstitutional a statute which rotated senatorial seats among the counties and permitted only voters in the county selecting the state senator to vote in the primary nominating the senator. In *Moore* v. *Moore,* 229 F. Supp. 435 (DC Ala., 1964), the Court held unconstitutional a statute which provides for election of congressmen at-large but which provides for nomination of congressional candidates from districts with unequal populations.

In *Socialist Labor Party* v. *Rhoades,* just decided by a three-judge U. S. District Court for the Southern District of Ohio, several provisions of the Ohio election laws were held to be unconstitutional, including a requirement respecting petitions for nominations of independent candidates for presidential electors. The Court stated:

> "To the extent that the Ohio Election Laws impose unreasonable restrictions on the qualifications of political third parties, restrict minority participation in Ohio's electoral process, prevent candidates for president and vice-president from qualifying as independents and deprive plaintiffs of their right of suffrage, either by denial of ballot position or effective write-in, they are unconstitutional and void."

As Justice Douglas stated in his dissent in *MacDougall* v. *Green, supra,* at page 288:

> "The protection which the Constitution gives voting rights covers not only the general election but also extend to every integral part of the electoral process, including primaries. (Citing cases.) When candidates are chosen for the general election by a nominating petition, that procedure also becomes an integral part of the electoral process. It is entitled to the same protection as that which the Fourteenth Amendment grants any other part."

The foregoing review of some of the leading cases subsequent to *Baker* v. *Carr* makes it evident that while the

facts in the instant case are virtually identical to those in *MacDougall* v. *Green*, the holding in the latter case no longer determines the issues they present. In *MacDougall* v. *Green*, the Court held at page 283:

> "It is clear that the requirement of two hundred signatures from at least fifty counties gives to the voters of the less populous counties of Illinois the power completely to block the nomination of candidates whose support is confined to geographically limited areas. But the State is entitled to deem this power not disproportionate: of 25,000 signatures required, only 9,800, or 39%, need be distributed; the remaining 61% may be obtained from a single county. And Cook County, the largest, contains not more than 52% of the State's voters. It is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality."

All that remains of that holding is the conclusion that the 1935 amendment enables voters from less populous counties to block the nomination of candidates whose support is confined to a majority of the population which resides in geographically limited areas. It is no longer allowable State policy to permit a minority of the voters, simply because of where they reside, to block the nomination of candidates supported by a majority:

> "Citizens," said the Court at page 580 in *Reynolds* v. *Sims*, *supra*, "not history of economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal population principle. Again, people, not land or trees or pastures vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical consideration."

Since the "right to vote freely for a candidate of one's choice is of the essence of a democratic society," as the Court said at page 555 of *Reynolds* v. *Sims*, *supra*, then the

method of choosing that candidate must meet the test of the equal protection clause of the Fourteenth Amendment. Under the 1935 amendment to Article 10 of the Illinois Election Code, petitions signed by every one of the 93.4 percent of the state's qualified voters who reside in the most populous counties could not nominate a single candidate for Presidential Elector. On the other hand, petitions signed by 25,000 of the 6.6 per cent of the state's qualified voters properly distributed in fifty of the fifty-three least populous counties could nominate a complete slate of candidates. Such classification of voters on the basis of where they live is contrary to the equal protection clause of the Fourteenth Amendment and is, therefore, unconstitutional.

IV.

The invalidation of the 1935 amendment would leave the Illinois Election Code intact in its original form. Plaintiffs have fulfilled the requirements of that Code.

The only provision assailed as unconstitutional in this suit is the 1935 amendment to Article 10 of the Illinois Election Code which requires that 200 signatures be obtained from each of 50 counties. The invalidation of this amendment as unconstitutional would not nullify the entire Illinois Election Code. Instead, it would leave the legislation intact in its original form. *People* v. *Alteric*, 356 Ill. 307 (1934). The Code would then only require that 25,000 qualified voters sign a petition to nominate independent candidates for Presidential Electors regardless of their place of residence.

Plaintiffs presented such a petition to the State Electoral Board. That Board refused to certify Plaintiffs to the county clerks solely because the petition failed to satisfy the unconstitutional place of residence requirements of the 1935 amendment. (Exhibit A to Complaint.) Plaintiffs, therefore, have fulfilled the constitutional statutory re-

quirements for certification and should be certified to the county clerks as Electors of President and Vice-President of the United States. Since ballots will soon be printed for the November 5, 1968 general election, Plaintiffs will not be so certified unless this Court declares the right of Plaintiff to be so certified and enjoins Defendants from declining or refusing so to certify them.

Since Sidney T. Holtzman, chairman of the board of election commissioners has stated that bids for printing the ballots will be opened on September 26, 1968 and printing will begin immediately thereafter (Chicago Sun Times, September 20, 1968, page 72), a Preliminary Injunction is essential in order to preserve Plaintiff's constitutional rights.

Conclusion.

For all of the reasons argued above, Plaintiffs respectfully submit that their prayer for declaratory and injunctive relief as set forth in their Complaint should be granted and that the Court grant Plaintiffs' motion for a Preliminary Injunction.

Respectifully submitted,

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(Affidavit of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT.

(Title omitted in printing.)

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS.

ARGUMENT.

The Illinois Statute Represents a Rational State Policy.

The traditional test of constitutionality under the Equal Protection Clause has been whether a State has made "an invidious discrimination." [See *Skinner* v. *Oklahoma,* 316 U. S. 535; *Williamson* v. *Lee Optical Co.,* 346 U. S. 483.] In *MacDougall* v. *Green,* 335 U. S. 281 (1948), the Supreme Court applied this very test and held that the same statute now challenged in this case represented a rational State policy. It stated:

> "It is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality. This is not a unique policy. [Citations omitted.] To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the State.* *" (335 U. S., at 283, 284.)

The population distribution in Illinois has not changed significantly to undercut the determination of rationality made in *MacDougall*. For example, plaintiffs allege in their present complaint that more than half the registered voters in Illinois reside in one county. (*Complaint*, par. 9). However, in 1948 when *MacDougall* was decided, more than half the voters in Illinois also resided in only one county. (335 U. S., at 283.) Likewise, whereas 61% of the State's voters are now allegedly registered in five counties (*Complaint*, par. 10), in 1948 a total of 59% of the voters resided in the same five counties. (*Complaint*, par. 34, *MacDougall* v. *Green*, U. S. Dist. Ct., N. D. of Ill., No. 48C-1406). Finally, in the instant Complaint, plaintiffs allege that 93.4% of the voters reside in 49 counties (Par. 11); in 1948 a total of 87% of the voters resided in the 49 most populous counties of Illinois. (335 U. S., at 283.)

In other words, what the U. S. Supreme Court held to be a rational State policy in 1948 must now, plaintiffs assert, be held to reflect *no* rational State policy and to amount to invidious discrimination—this despite only insignificant population changes within Illinois since 1948. Plaintiffs give no reason why this Court should now find no policy when the Supreme Court on substantially the same facts found a rational policy, and *MacDougall* is dispositive of all issues which plaintiffs have raised.

The plaintiffs will undoubtedly contend that the more recent cases of *Baker* v. *Carr* [369 U. S. 186 (1962)], *Reynolds* v. *Sims* [377 U. S. 533 (1964)] and *Avery* v. *Midland* [36 L. W. 4257 (1968)] now compel a different conclusion than the one reached in *MacDougall*. Those cases, however, are inapposite. In *Baker* the Supreme Court merely decided that jurisdictional objections should not preclude a Federal court from hearing an action wherein it was claimed that equal protection had been violated in connection with voting rights. In contrast to this decision,

MacDougall was decided on its merits and not on jurisdictional grounds. *Reynolds* holds that the right to vote is infringed when legislators are elected from districts of substantially unequal populations, and *Avery* merely extended the *Reynolds* holding to the political subdivisions of the State. All three decisions involved the right of citizens to vote, a right held therein to be constitutionally protected, whereas in this case we are concerned with the right to nominate, and not the right to vote. If in fact an Illinois citizen had some absolute constitutional right to nominate, as apparently the plaintiffs are contending, then it would be unconstitutional to provide, as has Illinois and many other states, that the electors should be chosen by the political parties at a State Convention. [1967 Ill. Rev. Stat., Ch. 46, § 21-1-(a)]. However, this case does not present any clear issue of whether the right to nominate is constitutionally protected, since the plaintiffs are not the signatories of these petitions, but rather the prospective candidates for electors. Nowhere does it appear that the plaintiffs are asserting the rights of those persons who signed plaintiffs' petitions, and even if the plaintiffs had attempted to assert such rights, they would lack standing to do so. Thus, even if there were authority for the proposition that the right to nominate is constitutionally protected, that issue is not presently presented by this case. Although the plaintiffs assert that the right to vote for them is in fact involved here, such an assertion is based on a misunderstanding of the Illinois Election Code. The Code specifically provides that the names of the electors are not to be placed on the ballot, and the voters will vote not for electors but rather for a presidential and vice presidential candidate. [1967 Ill. Rev. Stat., Ch. 46, § 21-1 (b)]. No such presidential and vice presidential candidates have been named by the plaintiffs, as far as this record shows, and therefore the right to vote is not involved herein at all.

The true issue presented by this case is whether the plaintiffs, prospective electors, have been denied equal protection of the law by virtue of the fact that they are required to show a base of support in any fifty counties of this State. The statute does not require that such petitions be distributed in the least populated counties, nor does it require that the petitions show signatures from the most populated counties. Nothing appears in this case to show that the least populated counties have in fact blocked the plaintiffs' prospective candidacy, and in fact from all that appears plaintiffs have made absolutely no attempt to obtain support in 50 counties of this State. The Illinois Election Code uniformly requires that any group, whether it be an independent group such as the plaintiffs, or a group starting a particular political party, show a base of support in any fifty counties of this State. [1967 Ill. Rev. Stat., Ch. 48, § 10-2]. The very fact that presidential candidate George Wallace has complied with this very provision, and has submitted signatures from fifty counties, shows that such can be done without great difficulty, and that such a provision is not meant to perpetuate certain individuals in office. The challenged provision in the Election Code works uniformly on all groups, without distinction on the basis of race, creed, economic status or location, and there is no way a denial of equal protection in the treatment accorded the plaintiffs. The mere fact that there are inequalities in population between political subdivisions does not *per se* invalidate an election scheme involving those subdivisions. See *Dusch* v. *Davis*, [387 U. S. 112 (1967)], where the Court permitted a city to choose its legislative body by a scheme that included at large voting for candidates, some of whom had to be residents of particular districts, even though the districts varied widely in population.

For these reasons the defendants submit that the plaintiffs have failed to state a claim, and the defendants ask therefore that the complaint be dismissed.

Respectfully submitted,

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(Affidavit of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

JAMES L. MOORE, et al.,
Plaintiffs,
vs.
SAMUEL SHAPIRO, et al.,
Defendants.

No. 68 C 1569.

ORDER.

This action was brought before a three-judge District Court convened in the Northern District of Illinois under 28 U. S. C. §§ 2281 and 2284 by twenty-six independent candidates for the offices of Presidential and Vice Presidential electors from the state of Illinois. Defendants are the members of the Illinois Electoral Board.

On August 5, 1968 plaintiffs filed nominating petitions signed by 26,500 qualified voters pursuant to the provisions of Illinois Revised Statutes, Ch. 46 § 10-3. Defendants ordered the county clerks to refuse to certify plaintiffs for the November 5, 1968 General Elections because plaintiffs' petition did not comply with the provisions of Section 10-3 of Chapter 46, Illinois Revised Statutes 1967. This Section, along with Section 10-2 of the same Chapter, was amended in 1935 by the addition of the following qualification:
"Provided that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties."

Plaintiffs herein are seeking a Declaratory Judgment pursuant to 28 U. S. C. § 2201, holding the above proviso

unconstitutional; declaring the action of the Electoral Board in refusing to order certification of plaintiffs by the county clerks null and void; and declaring plaintiffs' petition valid and sufficient for nomination. The Complaint further seeks an injunction under 28 U. S. C. § 2202, prohibiting defendants from refusing to certify plaintiffs to the county clerks for nomination.

Having jurisdiction of the subject matter and having considered the briefs and authorities submitted by the parties, the Court feels itself bound by *MacDougall* v. *Green*, 335 U. S. 281 (1948), wherein the Supreme Court upheld an identical provision, stating that "it is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality." 335 U. S. 283.

IT IS HEREBY ORDERED:

1. That the prayer for Temporary Injunction is denied.
2. That the prayer for Declaratory Judgment is denied.
3. That the complaint is dismissed for failure to state a cause of action.

A memorandum decision will be issued soon.

Enter:

/s/ JOHN S. HASTINGS,
Circuit Judge, United States Court of Appeals.

/s/ BERNARD M. DECKER,
Judge, United States District Court.

/s/ WILLIAM J. LYNCH,
Judge, United States District Court.

Dated: October 1, 1968.

IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois,
Eastern Division.

JAMES L. MOORE, et al.,
Plaintiffs,
vs.
SAMUEL SHAPIRO, et al.,
Defendants.
No. 68 C 1569.

MEMORANDUM OF DECISION.

Before Hastings, Circuit Judge, Decker and Lynch, District Judges.

Per Curiam: This action was brought before a three-judge District Court convened in the Northern District of Illinois under 28 U. S. C. §§ 2281 and 2284, by twenty-six independent candidates for the offices of Presidential and Vice Presidential electors from the state of Illinois. Defendants are members of the Illinois Electoral Board.

On August 5, 1968 plaintiffs filed nominating petitions signed by 26,500 qualified voters. Defendants ordered the county clerks to refuse to certify plaintiffs for the November 5, 1968 General Elections because plaintiffs' petition did not comply with certain provision of Section 10-3 of Chapter 46, Illinois Revised Statutes 1967. This Section, along with Section 10-2 of the same Chapter, was amended in 1935 by the addition of the following qualification: "Provided that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties." Plaintiffs' petition did not contain signatures of 200 such voters from each of 50 counties.

Plaintiffs herein are seeking a Declaratory Judgment, pursuant to 28 U. S. C. 2201, holding the above proviso unconstitutional, declaring the action of the Electoral Board in refusing to order certification of plaintiffs by the county clerks null and void; and declaring plaintiffs' petition valid and sufficient for nomination. The Complaint further seeks an injunction, under 28 U. S. C. 2202, prohibiting defendants from refusing to certify plaintiffs to the county clerks for nomination.

JURISDICTION.

An identical 1935 Amendment qualifying Section 10-2, Ch. 46, Illinois Revised Statutes, 1967 which prescribes the requirements for nominating an independent third party, was challenged before the Supreme Court twenty years ago in *MacDougall* v. *Green*, 335 U. S. 281, 69 S. Ct. 1, 93 L. Ed. 3. A three-judge District Court therein had previously dismissed the action for lack of jurisdiction. The Supreme Court affirmed *after* a hearing on the merits. Commenting on this apparent inconsistency, Justice Brennan, in the majority opinion of *Baker* v. *Carr*, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, noted the Supreme Court's disagreement with the District Court's finding of a lack of jurisdiction. 369 U. S., at 203.

The *MacDougall* and *Baker* cases are controlling on the issue of jurisdiction in present action. Voting rights are secured by the Equal Protection Clause of the Fourteenth Amendment. The Federal District Courts have jurisdiction under 28 U. S. C. § 1343 (3) "... to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." This grant clearly gives this Court jurisdiction to hear the matter before it.

THE CONSTITUTIONAL ISSUE.

The provision of the Illinois Election Code being challenged in this action was found to be constitutional by the Supreme Court of the United States in the case of *MacDougall* v. *Green, supra*. In *Baker* v. *Carr, supra,* Justice Brennan noted the Supreme Court's prior decision thusly:

> "In *MacDougall* v. *Green* (cite omitted), the District Court dismissed for want of jurisdiction, which had been invoked under 28 U. S. C. § 1343 (3), 28 U. S. C. A. § 1343 (3), a suit to enjoin enforcement of the requirement that nominees for state-wide elections be supported by a petition signed by a minimum number of persons from at least 50 of the State's 102 counties. This Court's disagreement with that action is clear since the Court affirmed the judgment after a review of the merits and concluded that the particular claim there was without merit." 369 U. S., 203.

The facts of the *MacDougall* case and the case before the bar are virtually identical except for insubstantial shifts in the concentration of population in the various Illinois counties.[1] Plaintiffs in this case, while admitting that the *MacDougall* decision bears directly against them, contend that the holding of the *MacDougall* case should be disregarded on the theory that the line of cases beginning with *Baker* v. *Carr* in 1962 has overruled the *MacDougall* decision by implication.

Justice Clark, concurring in the decision of the majority in *Baker,* was able to distinguish that case from *MacDougall* (and, therefore, also from the instant case) thusly:

---

1. Both plaintiffs in the present case and in the *MacDougall* case alleged that more than half of the registered voters in Illinois reside in one county. (Complaint, Par. 10; 355 U. S., at 28). Plaintiffs presently allege that 61% of the State's voters are now registered in five counties compared with 59% in the same five counties in 1948. (Complaint, par. 34; *MacDougall* v. *Green,* U. S. Dist. Ct., N. D. of Ill., No. 48 C 1406). Plaintiffs allege that 93.4% of the voters reside in 49 counties compared with 87% in the same 49 counties in 1948. (Complaint, par. 11; 355 U. S., at 283).

> "I take the law of the case from *MacDougall* v. *Green* (cite omitted), which involved an attack under the Equal Protection Clause upon an Illinois election statute. The Court decided the case on its merits without hindrance from the 'political question' attack. Although the statute was upheld, it is clear that the Court based its decision upon the determination that the statute represents a rational state policy." 369 U. S., at 251, 252.

Justices Clark and Stewart agreed that the Tennessee apportionment statute under attack was, contrary to the Illinois statute in *MacDougall,* totally unreasonable and arbitrary.

Ordinarily, discovery of precedent in the form of a Supreme Court decision squarely on point determines an issue. However, in the area of voting rights today we must go further and ask whether or not what was considered to be a "rational state policy" in 1948 is still considered as such today.

It is clear that Justices Clark and Stewart concurring in the *Baker* decision, were of the opinion that apportionment of a state legislature, if done on a rational basis, need not be based strictly on population. However, a more strict approach has evolved from subsequent Supreme Court cases. Today, the apportionment of legislative representation in virtually all levels of government must be based on population as nearly as possible. See *Wesbury* v. *Sanders,* 376 U. S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481; *Reynolds* v. *Sims,* 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506; *Avery* v. *Midland,* 36 L. W. 4257 (1968).

Some divergence from this standard is necessary, but the character and amount of such divergence which will be tolerated is unclear. Chief Justice Warren, in *Reynolds* v. *Sims, supra,* has pointed out that the Supreme Court presently deems it:

> "expedient not to spell out any precise constitutional

> tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the more satisfactory means of arriving at detailed constitutional requirements in the area of state legislative reapportionment. 377 U. S., at 578.

While it is clear that constitutional standards in this area may vary among the national, state, county and municipal levels as well as from State to State, we find some guidance from a 1967 Supreme Court case.

The case of *Dusch* v. *Davis*, 387 U. S. 112, 87 S. Ct. 1554, 18 L. Ed. 2d 656, involved a local plan consolidating the City of Virginia Beach and Princess Anne County into a new governmental unit of seven boroughs which vary considerably in population. The plan (called the "Seven-Four Plan") created an eleven-member city council elected at large. Each of seven council members must reside in a different one of the boroughs.

Plaintiffs therein alleged that the plan violated "the principles of *Reynolds* v. *Sims*." The District Court approved the plan, but the Court of Appeals for the Fourth Circuit reversed, 361 F. 2d at 497. The Supreme Court upheld the District Court. Justice Douglas, writing the opinion of the Court, found that "the plan uses boroughs in the city 'merely as the basis of residence for candidates, not for voting or representation.' " 387 U. S., at 115. The Court further noted that "The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megapolous in relation to the city, the suburbia, and the rural countryside." 387 U. S., at 117. No invidious discrimination was found in the plan.

The "Seven-Four Plan" and the challenged Illinois Election Code provision share the same underlying prin-

ciples—they are but different means to the same effect. The District Court in the *Dusch* case decided that:

> "The Seven-Four Plan is not an evasion scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population."

This description applies equally well to the residence requirements within Sections 10-2 and 10-3 of the Illinois Election Code. The purpose of these provisions is obviously to require a state-wide candidate to show minimal state-wide support. An elected official on the state level represents all the people in the state. Such representatives should be aware of and concerned with the problems of the whole State and not just certain portions thereof. This is the policy behind the challenged provision; it is a rational policy. It is accomplished without undue burden on the potential candidates and without unnecessary interference with the weight or the effectiveness of an Illinois citizen's right to vote.

In fact the right to vote in Illinois would only be unreasonably affected if, somehow, virtually entire populations of 53 of the lesser populated counties decided to preclude a majority of the State's qualified voters from nominating candidates of their choice. This does not appear likely. If such schemes ever came to light, the situation can be re-examined.

Thus, this Court finds that Section 10-3 of the Illinois Election Code, Ch. 46, Illinois Revised Statutes 1967, is an expression of rational state policy and that, therefore, it is constitutional under *MacDougall* v. *Green, supra.* As was pointed out in *Baker* v. *Carr, supra,* "*MacDougall* v. *Green,*

(cite omitted), held only that in that case, equity would not act to void the State's requirement that there be at least a minimum of support for nominees for state-wide office, over at least a minimal area of the State." 369 U. S., at 234. This Court agrees with that course of action and follows the same in dismissing the present Complaint.

In sum, plaintiffs contend that, although the case of *MacDougall* v. *Green, supra,* is a direct precedent against their constitutional claims, the Supreme Court today would overrule *MacDougall* v. *Green* and that, in effect, we should hold this precedent not to be controlling. The short answer to this is that the Court itself has cited *MacDougall* v. *Green* in a number of recent decisions and has considered it to be a holding on its merits and has not set aside such a determination. We do not deem it to be our function to second guess and overrule a standing precedent in the identical case now before us. We believe that to be the sole prerogative of the Supreme Court and we respectfully decline to usurp that function.

/s/ John S. Hastings,
Circuit Judge, United States Court of Appeals.

/s/ Bernard M. Decker,
Judge, United States District Court.

/s/ William J. Lynch,
Judge, United States District Court.

Dated: Oct. 3, 1968.

UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

JAMES L. MOORE, et al.,
Plaintiffs,
vs.
SAMUEL SHAPIRO, et al.,
Defendants.

Civil Action No.
68 C 1569.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Notice is hereby given that the Plaintiffs herein, by and through their attorneys, hereby appeal to the Supreme Court of the United States from the final order of the three-judge court dismissing the complaint and denying temporary and permanent injunctive relief, such order being entered in this action on October 1, 1968.

This appeal is taken pursuant to 28 U. S. C. A. § 1253.

The Clerk of the United States District Court for the Northern District of Illinois has been asked to prepare and certify a transcript of record consisting of all the original papers, documents and orders in the case.

The following questions are presented by this appeal:

Does the 1935 Amendment to Section 3 of Article 10 of the Election Code of Illinois, requiring that nomination petitions for independent candidates for state-wide office must contain not less than 200 signatures from each of at least 50 counties, constitute an arbitrary, unreasonable, and discriminatory restriction on the right of the Illinois voters to nominate and vote for candidates of their own choice in violation of Amendment XIV to the United States Constitution, and particularly the privileges and immunities,

equal protection of the laws and the due process clauses thereof?

Is the Supreme Court's decision in *MacDougall* v. *Green*, 335 U. S. 231 (1948) still the law? Has not Justice Douglas' dissent in that case now been adopted by the Supreme Court as a valid statement of the principles governing this cause?

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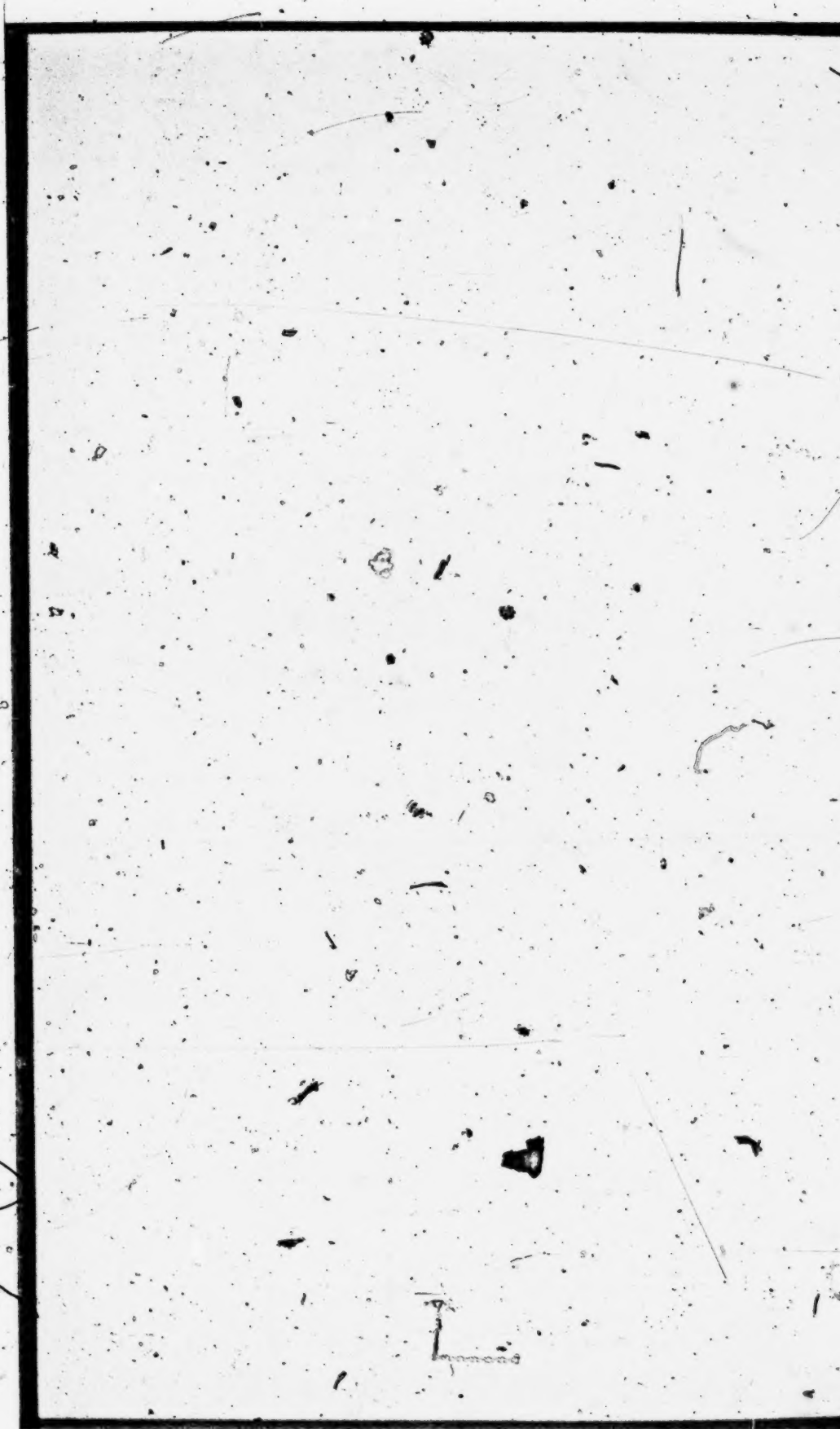

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 620

JAMES L. MOORE, ET AL.,

Plaintiffs,

vs.

SAMUEL SHAPIRO, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF ILLINOIS, ET AL.,

Defendants.

JURISDICTIONAL STATEMENT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

SUBJECT INDEX.

Index of Authorities Cited.

Cases.

U. S. Constitution and Statutes.

Illinois Statutes.

Other.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. .....

JAMES L. MOORE, ET AL.,

Plaintiffs,

vs.

SAMUEL SHAPIRO, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF ILLINOIS, ET AL.,

Defendants.

JURISDICTIONAL STATEMENT.

OPINION BELOW.

The opinion below has not been officially or unofficially reported as yet, but a copy is appended hereto in full as Appendix A. The opinion was filed on October 3, 1968. The order of dismissal appealed from was entered on October 1, 1968.

GROUND ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

Jurisdiction of this Court to review the order on direct appeal is conferred by 28 U. S. C. Section 1253.

This is an appeal from an order entered by a three-judge District Court in the Northern District of Illinois on

October 1, 1968. Notice of Appeal was filed on October 4, 1968.

A copy of the order of October 1, 1968 is appended hereto in full as Appendix B.

STATUTES INVOLVED.

This case involves a challenge to the constitutionality of Article 10, Section 3 of the Illinois Election Code. That section reads in pertinent part as follows:

> Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; Provided, however, that included in the aggregate total of 25,000 signatures are the signatures of 200 qualified voters from each of at least 50 counties within the State.

QUESTIONS PRESENTED.

1. Is the Supreme Court's decision in *MacDougall* v. *Green*, 335 U. S. 281 (1948) still the law? Has not Justice Douglas' dissent in that case now been adopted by the Supreme Court as a valid statement of the principles governing this cause?

2. Does the 1935 Amendment to Section 3 of Article 10 of the Election Code of Illinois, requiring that nomination petitions for independent candidates for state-wide office must contain not less than 200 signatures from each of at least 50 counties, constitute an arbitrary, unreasonable, and discriminatory restriction on the right of the Illinois voters to nominate and vote for candidates of their own choice in violation of Amendment XIV to the United States Constitution, and particularly the privileges and immunities, equal protection of the laws and due process clauses thereof?

STATEMENT OF THE CASE.

This suit originated as an action for Declaratory Judgment under Section 2201 of the Judicial Code and for injunctive relief as authorized by Section 2202 of the Judicial Code. It was brought by twenty-six independent candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois. The defendants were the members of the State of Illinois Electoral Board, namely, Samuel Shapiro, Governor, Paul Powell, Secretary of State, Michael J. Howlett, Auditor of Public Accounts, Adlai E. Stevenson, III, Treasurer, William G. Clark, Attorney General, James A. Ronan, Chairman of the State Democratic Central Committee, and Victor L. Smith, Chairman of the State Republican Central Committee. The Board is provided for by Section 7-14 of the Illinois Election Code, Ill. Rev. Stat., Chap. 46, Sec. 7-14.

Electors of President and Vice-President of the United States are to be voted on at the General Election to be held on November 5, 1968. On August 5, 1968, pursuant to Article 10 of the Illinois Election Code, Plaintiffs filed petitions with Defendants containing the names of 26,500 qualified voters who desired to have Plaintiffs nominated as independent candidates for the offices of Presidential Electors. Prior to 1935, Section 3 of said Article 10 required that at least 25,000 electors sign a petition to nominate such candidates. In 1935 that statute was amended. The requirement of at least 25,000 signatures was retained, but the following proviso was added:

> Provided, that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties. (Ill. Rev. Stat. 1967, Chap. 46, Sec. 10-3.)

This section provides the only means whereby qualified voters in Illinois can nominate independent candidates for statewide office. An identical place-of-residence requirement is contained in Section 2 of Article 10 with respect to nominating candidates of a new political party for statewide office.

On August 16, 1968 Defendants ruled that Plaintiffs could not be certified to the county clerks for the November 5, 1968 General Election on the sole ground that the petition

> does not contain signatures of 200 qualified voters from each of at least 50 counties within the State. Said petition only contains 24 counties with over 200 signatures. Therefore, said petition does meet with the requirements of Section 10-3. . . . (Exhibit A of Complaint.)

On August 22, 1968 the Compaint in this cause was filed and assigned to Judge William J. Lynch. The Complaint prayed for a Declaratory Judgment holding and declaring that the amendment to Section 3 of Article 10 requiring 200 signatures from each of at least 50 counties is unconstitutional in violation of the Fourteenth Amendment to the United States Constitution and holding and declaring that the decision of the State Electoral Board with respect to the insufficiency of the nominating petitions is null and void, and that such petitions are valid and sufficient at law to have Plaintiffs' names certified to the county clerks as candidates for the offices of Electors of President and Vice-President. The Complaint further prayed for a decree, under Section 2202 of the Judicial Code, enjoining Defendants from refusing to certify Plaintiffs to the county clerks for such purpose. Finally, the Complaint requested that a three-judge court be convened at the earliest possible opportunity pursuant to Sections 2281 and 2284 of the Judicial Code since Plaintiffs were asking that enforcement of a state statute be enjoined.

On August 26, 1968, pursuant to notice of motion mailed to Defendants on August 22, attorneys for Plaintiffs appeared before Chief Judge William J. Campbell, who was hearing emergency motions, and moved that the District Court advise the Chief Judge of the Court of Appeals for the Seventh Circuit of the application for injunctive relief to the end that a three-judge court be convened pursuant to Sections 2281 and 2284 of the Judicial Code. Chief Judge Campbell declined to grant relief and set the motion down for hearing before Judge Lynch fifteen days thereafter on September 10. Judge Lynch heard and granted the motion on September 11.

Pursuant thereto a three-judge district court was convened. By order of Judge Lynch, briefs were submitted to the three-judge court on September 26, 1968.

Thereafter, without hearing oral argument, the three-judge court issued its order on October 1, 1968. The essence of the court's reasoning is contained in the following paragraph:

> Having jurisdiction of the subject matter and having considered the briefs and authorities submitted by the parties, the Court feels itself bound by *MacDougall* v. *Green*, 335 U. S. 281 (1948), wherein the Supreme Court upheld an identical provision, stating that "it is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality." 335 U. S. 283.

The court denied the request for preliminary injunctive relief, denied the prayer for Declaratory Judgment, and dismissed the complaint for failure to state a cause of action. It is these rulings which are at issue in this appeal.

The three-judge court stated that a memorandum opinion would follow. On October 3, 1968 the three-judge court issued its memorandum opinion. Although amplified somewhat, the reasoning was substantially identical to that contained in the order.

ARGUMENT.

I.

THE 1935 AMENDMENT TO SECTION 3 OF ARTICLE 10 OF THE ILLINOIS ELECTION CODE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The three-judge court, dismissing Plaintiffs' petition and denying all requested relief, relied solely on this Court's decision in *MacDougall* v. *Green*, 335 U. S. 281 (1948). It is true that the facts presented in the instant case are virtually identical to those present in *MacDougall*.

The facts vary only in that in 1948 the five most populous Illinois counties had 59 per cent of the registered voters; in 1968 they had 61 per cent. In 1948 the forty-nine most populous counties had 87 per cent of the registered voters; in 1968 they had 93.4 per cent. As in the present case, Plaintiffs in the *MacDougall* case were seeking to be certified to the county clerks for a Federal and statewide election without obtaining 200 signatures from each of 50 counties as required by the 1935 amendment to Article 10 of the Illinois Election Code. In the twenty years since the *MacDougall* case, however, the law has changed considerably.

In the *MacDougall* case this Court, by a vote of six to three, affirmed the District Court's denial of an interlocutory injunction and dismissal of the complaint on the basis of *Colegrove* v. *Green*, 328 U. S. 549 (1946), and *Colegrove* v. *Barrett*, 330 U. S. 804 (1946). Justice Rutledge concurred with the majority on the ground that the Court should decline to exercise its jurisdiction in equity. Justice Douglas, with whom Justices Black and Murphy concurred,

dissented, and, it seems manifest, the statement of the law urged in that dissent is now the law of the land.

It may be that Justice Frankfurter's opinion at page 554 in the 1946 *Colegrove* case that judicial enforcement of equality of voting power would constitute "pernicious . . . judicial intervention in an essentially political contest dressed up in the abstract phrases of the law" actually stated the ruling of that case. If it did, the Supreme Court, in the 1962 case of *Baker* v. *Carr*, 369 U. S. 186 (1962), drastically changed the focus for viewing cases which involve political issues. The question in such cases, said the Court at page 226, "is the consistency of state action with the Federal Constitution." This Court held that complainant's allegation that the state's apportionment act resulted in a classification of voters which favored those in some counties over others presented a justiciable cause of action under the equal protection clause of the Fourteenth Amendment.

Since the *Baker* decision, this Court and many District Courts have held numerous state statutes which classified voters and weighted votes on the basis of place of residence for purposes of nomination or election to be unconstitutional, enjoined their enforcement, and ordered elections consistent with the principle of one man, one vote. (See Annotation, "Inequalities In Population of Election Districts or Voting Units as Rendering Apportionment Unconstitutional," 12 L. ed. 2d 1282.)

In *Reynolds* v. *Sims*, 377 U. S. 533 (1964), this Court affirmed the holding of a three-judge court that the existing and proposed apportionment provisions for the Alabama legislature were unconstitutional because they conflicted with the equal protection clause of the Fourteenth Amendment, and affirmed its order for a temporary reapportionment. The existing and proposed statutes apportioned state representatives and senators among districts

and counties so that voters in the more populous counties did not elect their proportionate share of representatives and senators. As stated at 377 U. S. 555:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

This Court dealt squarely with the unconstitutionality of place-of-residence requirements such as that of the 1935 amendment to the Illinois Election Code. "Diluting the weight of votes because of place of residence," it said at page 566, "impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race. . . ." Not place of residence but "population," this Court held at page 567, "is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies."

This Court has left no doubt as to how the issues in *MacDougall* v. *Green*, 335 U. S. 281 (1948), were to be decided under the law as stated in the *Reynolds* case. In footnote 40 at page 563 in the *Reynolds* case, the Court quoted as follows from Justice Douglas' dissent in the *MacDougall* case:

> [A] regulation . . . [which] discriminates against the residents of the populous counties of the state in favor of rural sections . . . lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.
>
> Free and honest elections are the very foundation of our republican form of government . . . . Discrimination against any group or class of citizens in the exercise of these constitutionally protected rights of

citizenship deprives the electoral process of integrity. . . .

> None would deny that a state law giving some citizens twice the vote of other citizens in either the primary or general election would lack that equality which the Fourteenth Amendment guarantees. . . . The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government.

Gray v. *Sanders*, 372 U. S. 368 (1963), held that the Georgia county-unit system in statewide primary elections was unconstitutional since it resulted in a dilution of the weight of some votes merely because of where the voters resided. As this Court said at pages 557-58:

> How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

Here, the geographical unit chosen for nomination and election of Presidential Electors is the State of Illinois. All registered voters must have equal power to nominate and elect, "wherever their home may be in the geographical unit."

Article 10 of the Illinois Election Code contains the only procedure for the nomination of candidates by voters who are not members of established political parties. It permits the forming of new parties and the nomination of independent candidates by nominating petitions. Under the

Illinois Election Code the procedure of nominating by petition under Article 10 is as much an integral part of the whole elective system as are the primary provisions for established parties set out in Articles 7, 8 and 9.

The Illinois Supreme Court has recognized explicitly the role of the nominating process in the elective process. In *People* v. *Election Commissioners,* 221 Ill. 9, 18 (1906), the Court stated unequivocally:

> The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen, *and is of precisely the same nature.* (Emphasis added.)

Similarly, in *The People* v. *Fox,* 294 Ill. 263 (1920), the Illinois Supreme Court held the Primary Act of 1919 unconstitutional as contrary to Section 18 of Article II of the Illinois Constitution, saying at page 268:

> Section 18 of the bill of rights provides that all elections shall be free and equal. This language has been construed by this court as meaning that the vote of every qualified elector shall be equal in its influence with every other one. . . . It is well settled in this state that the term 'election' applies to a primary for the nomination of candidates as well as to the election of such candidates to office, and the right to choose candidates for public office, whose names are to be placed on the official ballot, has been held as valuable as the right to vote for them after they are chosen and is of precisely the same nature.

It is well settled that, where a party primary is an integral part of the procedure of election, the right to vote in a primary is a right protected by the United States Constitution. *United States* v. *Classic,* 313 U. S. 299, 314-318 (1941). In *Smith* v. *Allwright,* 321 U. S. 649, 664 (1944), this Court stated:

> When primaries become a part of the machinery for

choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election.

Following *Baker* v. *Carr,* 369 U. S. 186 (1962), this Court has applied the same tests to determine the character of discrimination or abridgement in statutes governing the nomination of candidates as in their election. As already noted, *Gray* v. *Sanders,* 372 U. S. 368 (1963), found unconstitutional a county-unit system in statewide primary elections. There, at pages 374-75, it was held that "state regulation of this preliminary phase of the election process makes it state action" within the meaning of the Fourteenth Amendment. *Toombs* v. *Fortson,* 205 F. Supp. 248 (DC Ga., 1962), held unconstitutional a statute which rotated senatorial seats among the counties and permitted only voters in the county selecting the state senator to vote in the primary nominating the senator. *Moore* v. *Moore,* 229 F. Supp. 435 (DC Ala., 1964), held unconstitutional a statute which provided for election of congressmen at-large but which provided for nomination of congressional candidates from districts with unequal populations.

In *Socialist Labor Party* v. *Rhoades,* just decided by a three-judge U. S. District Court for the Southern District of Ohio, and now before this Court as Nos. 543 and 544, several provisions of the Ohio election laws were held to be unconstitutional, including a requirement respecting petitions for nominations of independent candidates for presidential electors. The District Court stated:

> To the extent that the Ohio Election Laws impose unreasonable restrictions on the qualifications of political third parties, restrict minority participation in Ohio's electoral process, prevent candidates for president and vice-president from qualifying as independ-

ents and deprive plaintiffs of their right of suffrage, either by denial of ballot position or effective write-in, they are unconstitutional and void.

As Justice Douglas stated in his dissent in *MacDougall* v. *Green*, 335 U. S. 281 (1948), at page 288:

> The protection which the Constitution gives voting rights covers not only the general election but also extends to every integral part of the electoral process, including primaries. (Citing cases.) When candidates are chosen for the general election by a nominating petition, that procedure also becomes an integral part of the electoral process. It is entitled to the same protection as that which the Fourteenth Amendment grants any other part.

The foregoing review of some of the leading cases subsequent to *Baker* v. *Carr* makes it evident that, while the facts in the present case are virtually identical to those in *MacDougall* v. *Green*, the holding in the latter case no longer determines the issues they present. In *MacDougall* v. *Green*, this Court held at page 283:

> It is clear that the requirement of two hundred signatures from at least fifty counties gives to the voters of the less populous counties of Illinois the power completely to block the nomination of candidates whose support is confined to geographically limited areas. But the State is entitled to deem this power not disproportionate: of 25,000 signatures required, only 9,800, or 39%, need be distributed; the remaining 61% may be obtained from a single county. And Cook County, the largest, contains not more than 52% of the State's voters. It is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality.

All that remains of that holding is the conclusion that the 1935 amendment enables voters from less populous counties to block the nomination of candidates whose support is confined to a majority of the population which re-

sides in geographically limited areas. It is no longer allowable State policy to permit a minority of the voters, simply because of where they reside, to block the nomination of candidates supported by a majority.

"Citizens," said the Court at page 580 in *Reynolds* v. *Sims*, 377 U. S. 533 (1964), "not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations.".

Since the "right to vote freely for a candidate of one's choice is of the essence of a democratic society," as this Court said at page 555 of *Reynolds* v. *Sims, supra,* then the method of choosing that candidate must meet the test of the equal protection clause of the Fourteenth Amendment. Under the 1935 amendment to Article 10 of the Illinois Election Code, petitions signed by every one of the 93.4 per cent of the state's qualified voters who reside in the most populous counties could not nominate a single candidate for Presidential Elector. On the other hand, petitions signed by 25,000 of the 6.6 per cent of the state's qualified voters properly distributed in fifty of the fifty-three least populous counties could nominate a complete slate of candidates. Such classification of voters on the basis of where they live is contrary to the equal protection clause of the Fourteenth Amendment and is, therefore, unconstitutional.

II.

THE 1935 AMENDMENT TO SECTION 3 OF ARTICLE 10 OF THE ELECTION CODE REQUIRING 200 SIGNATURES FROM EACH OF 50 COUNTIES CONSTITUTES AN ARBITRARY, UNREASONABLE, AND DISCRIMINATORY RESTRICTION ON THE RIGHT OF ILLINOIS VOTERS TO NOMINATE AND VOTE FOR CANDIDATES OF THEIR OWN CHOICE.

As discussed above, the *sole* authority on which the three-judge court relied in upholding Section 3 of Article 10 has, through a long series of decisions of this Court, been thoroughly undercut. However, there are additional reasons which mitigate against its continued viability.

The requirement here in issue was added by amendment in 1935. *Laws,* 1935, p. 789. Before that amendment, the signatures required to nominate independent candidates for statewide offices, and for Presidential Electors, were counted on a statewide basis and only in terms of the total to be obtained: 25,000 signatures of qualified voters in the state. The requirement for nominating candidates of a new political party was identical.

The 1935 amendment added an additional and weighted requirement based on the place of residence of the registered voters. The 1935 amendment made it mandatory that the 25,000 registered voters meet a further, and, in view of the population distribution in Illinois, highly unequal requirement as to their place of residence within the statewide geographical unit for which candidates were to be elected. The 25,000 signatures must include those of at least 200 registered voters from each of 50 counties. In other words, under the 1935 amendment, the signatures of neither 25,000 registered voters nor of 4,000,000 registered voters will satisfy the statutory requirement for nomination of independent or new-party candidates unless

they meet place-of-residence requirements contrary to the population-based requirements of the Fourteenth Amendment.

The distribution of population among the 102 Illinois counties shows the extent to which the 1935 amendment debases and dilutes the right of qualified voters to participate in the electoral process.

More than 50 per cent of the total Illinois population and more than 50 per cent of the Illinois registered voters reside in *one* county, Cook County.

Approximately 61 per cent of the Illinois registered voters reside in the state's *five* most populous counties: Cook, DuPage, Lake, Madison, and St. Clair.

Approximately 93.4 per cent of the Illinois registered voters reside in the state's *forty-nine* most populous counties: Cook, DuPage, Lake, Madison, St. Clair, Adams, Bureau, Champaign, Christain, Clinton, Coles, DeKalb, Franklin, Fulton, Hancock, Henry, Iroquois, Jackson, Jefferson, Kane, Kankakee, Knox, La Salle, Lee, Livingston, Logan, Macon, Macoupin, Marion, McDonough, McHenry, McLean, Montgomery, Morgan, Ogle, Peoria, Randolph, Rock Island, Saline, Sangamon, Shelby, Stephenson, Tazewell, Vermillion, Whiteside, Will, Williamson, Winnebago and Woodford.

Approximately 6.6 per cent of Illinois registered voters reside in the *fifty-three* remaining counties.

The 1935 amendment thus prevents the majority of the state's registered voters who reside in Cook County from nominating independent candidates for Presidential Electors and statewide offices or from forming a new political party in the state for those purposes.

The 1935 amendment also prevents the 61 percent of the state's registered voters who reside in Cook, DuPage, Lake, Madison, and St. Clair Counties from nominating in-

dependent candidates for Presidential Electors and statewide offices or from forming a new political party in the state for those purposes.

The 1935 amendment even prevents the 93.4 per cent of the state's registered voters who reside in the state's forty-nine most populous counties from nominating independent candidates for Presidential Electors and statewide offices.

But the 1935 amendment permits 25,000 of the remaining 6.6 per cent of the registered voters properly distributed among fifty of the fifty-three least populous counties to nominate such candidates or to form such a new party.

The effect of the 1935 amendment is drastically to debase the weight of a qualified voter in a populous county as against the weight of a qualified voter in the less populated counties. No number of additional signatures over and above the required 200 in a populous county can overcome the lack of 200 in one of the less populated counties. One qualified voter does not have the same right to nominate as every other qualified voter. His signature on a nominating petition counts only if he resides in the right county. And the smaller the population of the county in which he resides, the more his signature counts.

The grotesque nature of the 1935 amendment to Article 10 of the Illinois Election Code is illustrated by the fact that the voters of Cook County, since they outnumber the voters of all the rest of the state put together, could elect the Presidential Electors, a United States Senator, and various statewide officers in the face of the united opposition of the voters of the other 101 counties. Indeed, that possibility is required by the Fourteenth Amendment to the United States Constitution.

Nevertheless, although that majority can elect, under the Illinois Election Code it cannot nominate. Although the minority cannot elect, it can nominate.

In fact, the majority cannot really elect in Illinois. The power of a majority to elect must mean the power to elect candidates of its and not the minority's choice. Since the majority cannot nominate candidates without the support of the minority, it can only elect candidates the minority has also agreed to choose.

It is clear, therefore, that the 1935 amendment to Article 10 of the Illinois Election Code heavily overweights the electoral power of voters residing in less populous counties and greatly underweights the electoral power of voters residing in the populous counties. The 1935 amendment deviates drastically from the rule of one man, one vote.

The three-judge court seeks solace from these inescapable facts in this Court's decision in *Dusch* v. *Davis,* 387 U. S. 112 (1967). In that case, this Court upheld a so-called "Seven-Four Plan" establishing residency requirements for prospective candidates for the City Council of a governmental unit of seven boroughs composed of what had formerly been the City of Virginia Beach and Princess Anne County. However, the crucial distinction between that case and the one at bar was emphasized by Mr. Justice Douglas, writing for the Court, when he noted that "the plan uses boroughs in the city 'merely as the basis of residence for candidates, not for voting or representation.'" 387 U. S. at 115. The provision of the Illinois Election Code here under attack does not establish residency requirements for candidates seeking state-wide office. Rather, it directly affects the weight of a vote of certain citizens of the state and thus suffers the precise infirmity which Justice Douglas failed to find in the *Dusch* case. It is submitted that the distinction between the two cases is obvious.

III.

THE INVALIDATION OF THE 1935 AMENDMENT WOULD LEAVE THE ILLINOIS ELECTION CODE INTACT IN ITS ORIGINAL FORM. PLAINTIFFS HAVE FULFILLED THE REQUIREMENTS OF THAT CODE.

The only provision assailed as unconstitutional in this suit is the 1935 amendment to Article 10 of the Illinois Election Code which requires that 200 signatures be obtained from each of 50 counties. The invalidation of this amendment as unconstitutional would not nullify the entire Illinois Election Code. Instead, it would leave the legislation intact in its original form. *People* v. *Alteric*, 356 Ill. 307 (1934). The Code would then only require that 25,000 qualified voters sign a petition to nominate independent candidates for Presidential Electors regardless of their place of residence.

Plaintiffs presented such a petition to the State Electoral Board. That Board refused to certify Plaintiffs to the county clerks solely because the petition failed to satisfy the unconstitutional place of residence requirements of the 1935 amendment. (Exhibit A to Complaint.) Plaintiffs, therefore, have fulfilled the constitutional statutory requirements for certification and should be certified to the county clerks as candidates for Electors of President and Vice President of the United States. Since ballots will soon be printed for the November 5, 1968 general election, Plaintiffs will not be so certified unless this Court declares the right of Plaintiffs to be so certified and rules that Defendants should be enjoined from declining or refusing so to certify them.

Sidney T. Holtzman, chairman of the Chicago Board of Election Commissioners stated that bids for printing the ballots would be opened on September 26, 1968 and that

printing would begin shortly thereafter (Chicago Sun Times, September 20, 1968, page 72). Consequently, it was essential that appellants seek a preliminary injunction in order to protect their constitutional rights.

CONCLUSION.

The cases of *Baker* v. *Carr*, 369 U. S. 186 (1962), *Gray* v. *Sanders*, 372 U. S. 368 (1963) and *Reynolds* v. *Sims*, 377 U. S. 533 (1964), as well as the many election cases which have followed, have settled that the district courts have jurisdiction of a suit such as this which attacks a state statute as unconstitutional on the ground that it deprives persons of equal protection of the laws by debasing and diluting their right to nominate and vote; that such suits state a justiciable cause of action; that persons such as Plaintiffs have standing in such suits to challenge state statutes as unconstitutional for violating the Fourteenth Amendment; and that declaratory and injunctive relief are appropriate remedies in such suits.

For all of the reasons stated above, Plaintiffs-Appellants respectfully submit that their prayer for declaratory and injunctive relief as set forth in their Complaint should have been granted and that the three-judge court erred in dismissing the cause. It is urged that this Court note probable jurisdiction, hear the cause, and thereupon reverse.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois, Eastern Division.

JAMES L. MOORE, *et al.*,
Plaintiffs,
v.
SAMUEL SHAPIRO, *et al.*,
Defendants.
No. 68 C 1569

MEMORANDUM OF DECISION.

Before HASTINGS, *Circuit Judge,* DECKER and LYNCH, *District Judges.*

Per Curiam: This action was brought before a three-judge District Court convened in the Northern District of Illinois under 28 U. S. C. §§ 2281 and 2284, by twenty-six independent candidates for the offices of Presidential and Vice Presidential electors from the state of Illinois. Defendants are members of the Illinois Electoral Board.

On August 5, 1968 plaintiffs filed nominating petitions signed by 26,500 qualified voters. Defendants ordered the county clerks to refuse to certify plaintiffs for the November 5, 1968 General Elections because plaintiffs' petition did not comply with certain provisions of Section 10-3 of Chapter 46, Illinois Revised Statutes 1967. This Section, along with Section 10-2 of the same Chapter, was amended in 1935 by the addition of the following qualification: "Pro-

vided that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties." Plaintiffs' petition did not contain signatures of 200 such voters from each of 50 counties.

Plaintiffs herein are seeking a Declaratory Judgment, pursuant to 28 U. S. C. 2201, holding the above proviso unconstitutional; declaring the action of the Electoral Board in refusing to order certification of plaintiffs by the county clerks null and void; and declaring plaintiffs' petition valid and sufficient for nomination. The Complaint further seeks an injunction, under 28 U. S. C. 2202, prohibiting defendants from refusing to certify plaintiffs to the county clerks for nomination.

JURISDICTION.

An identical 1935 Amendment qualifying Section 10-2, Ch. 46, Illinois Revised Statutes, 1967 which prescribes the requirements for nominating an independent third party, was challenged before the Supreme Court twenty years ago in *MacDougall* v. *Green,* 335 U. S. 281, 69 S. Ct. 1, 93 L. Ed. 3. A three-judge District Court therein had previously dismissed the action for lack of jurisdiction. The Supreme Court affirmed *after* a hearing on the merits. Commenting on this apparent inconsistency, Justice Brennan, in the majority opinion of *Baker* v. *Carr,* 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, noted the Supreme Court's disagreement with the District Court's finding of a lack of jurisdiction. 369 U. S., at 203.

The *MacDougall* and *Baker* cases are controlling on the issue of jurisdiction in present action. Voting rights are secured by the Equal Protection Clause of the Fourteenth Amendment. The Federal District Courts have jurisdiction under 28 U. S. C. § 1343 (3) " . . . to redress the deprivation, under color of any State law, statute, ordinance,

regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." This grant clearly gives this Court jurisdiction to hear the matter before it.

The Constitutional Issue.

The provision of the Illinois Election Code being challenged in this action was found to be constitutional by the Supreme Court of the United States in the case of *MacDougall* v. *Green, supra.* In *Baker* v. *Carr, supra,* Justice Brennan noted the Supreme Court's prior decision thusly:

> "In *MacDougall* v. *Green,* (cite omitted), the District Court dismissed for want of jurisdiction, which had been invoked under 28 U. S. C. § 1343 (3), 28 U. S. C. A. § 1343 (3), a suit to enjoin enforcement of the requirement that nominees for state-wide elections be supported by a petition signed by a minimum number of persons from at least 50 of the State's 102 counties. This Court's disagreement with that action is clear since the Court affirmed the judgment after a review of the merits and concluded that the particular claim there was without merit." 369 U. S., 203.

The facts of the *MacDougall* case and the case before the bar are virtually identical except for insubstantial shifts in the concentration of population in the various Illinois counties.[1] Plaintiffs in this case, while admitting that the

1. Both plaintiffs in the present case and in the *MacDougall* case alleged that more than half of the registered voters in Illinois reside in one county. (Complaint, Par. 10; 355 U. S., at 28.) Plaintiffs presently allege that 61% of the State's voters are now registered in five counties compared with 59% in the same five counties in 1948. (Complaint, par. 34; *MacDougall* v. *Green,* U. S. Dist. Ct., N. D. of Ill., No. 48 C 1406.) Plaintiffs allege that 93.4% of the voters reside in 49 counties compared with 87% in the same 49 counties in 1948. (Complaint, par. 11; 355 U. S., at 283.)

MacDougall decision bears directly against them, contend that the holding of the *MacDougall* case should be disregarded on the theory that the line of cases beginning with *Baker* v. *Carr* in 1962 has overruled the *MacDougall* decision by implication.

Justice Clark, concurring in the decision of the majority in *Baker,* was able to distinguish that case from *MacDougall* (and, therefore, also from the instant case) thusly:

> "I take the law of the case from *MacDougall* v. *Green* (cite omitted), which involved an attack under the Equal Protection Clause upon an Illinois election statute. The Court decided the case on its merits without hindrance from the 'political question' attack. Although the statute was upheld, it is clear that the Court based its decision upon the determination that the statute represents a rational state policy." 369 U. S., at 251, 252.

Justices Clark and Stewart agreed that the Tennessee apportionment statute under attack was, contrary to the Illinois statute in *MacDougall,* totally unreasonable and arbitrary.

Ordinarily, discovery of precedent in the form of a Supreme Court decision squarely on point determines an issue. However, in the area of voting rights today we must go further and ask whether or not what was considered to be a "rational state policy" in 1948 is still considered as such today.

It is clear that Justices Clark and Stewart concurring in the *Baker* decision, were of the opinion that apportionment of a state legislature, if done on a rational basis, need not be based strictly on population. However, a more strict approach has evolved from subsequent Supreme Court cases. Today, the apportionment of legislative representation in virtually all levels of government must be based on population as nearly as possible. See *Wesbury* v.

Sanders, 376 U. S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481; *Reynolds* v. *Sims*, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506; *Avery* v. *Midland*, 36 L. W. 4257 (1968).

Some divergence from this standard is necessary, but the character and amount of such divergence which will be tolerated is unclear. Chief Justice Warren, in *Reynolds* v. *Sims, supra*, has pointed out that the Supreme Court presently deems it:

> "expedient not to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the more satisfactory means of arriving at detailed constitutional requirements in the area of state legislative reapportionment." 377 U. S., at 578.

While it is clear that constitutional standards in this area may vary among the national, state, county and municipal levels as well as from State to State, we find some guidance from a 1967 Supreme Court case.

The case of *Dusch* v. *Davis*, 387 U. S. 112, 87 S. Ct. 1554, 18 L. Ed. 2d 656, involved a local plan consolidating the City of Virginia Beach and Princess Anne County into a new governmental unit of seven boroughs which vary considerably in population. The plan (called the "Seven-Four Plan") created an eleven-member city council elected at large. Each of seven council members must reside in a different one of the boroughs.

Plaintiffs therein alleged that the plan violated "the principles of *Reynolds* v. *Sims*." The District Court approved the plan, but the Court of Appeals for the Fourth Circuit reversed, 361 F. 2d at 497. The Supreme Court upheld the District Court. Justice Douglas, writing the opinion of the Court, found that "the plan uses boroughs in the city 'merely as the basis of residence for candidates,

not for voting or representation.'" 387 U. S., at 115. The Court further noted that "The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megapolous in relation to the city, the suburbia, and the rural countryside." 387 U. S., at 117. No invidious discrimination was found in the plan.

The "Seven-Four Plan" and the challenged Illinois Election Code provision share the same underlying principles—they are but different means to the same effect. The District Court in the *Dusch* case decided that:

> "The Seven-Four Plan is not an evasion scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population."

This description applies equally well to the residence requirements within Sections 10-2 and 10-3 of the Illinois Election Code. The purpose of these provisions is obviously to require a state-wide candidate to show minimal state-wide support. An elected official on the state level represents all the people in the state. Such representatives should be aware of and concerned with the problems of the whole State and not just certain portions thereof. This is the policy behind the challenged provision; it is a rational policy. It is accomplished without undue burden on the potential candidates and without unnecessary interference with the weight or the effectiveness of an Illinois citizen's right to vote.

In fact the right to vote in Illinois would only be unreasonably affected if, somehow, virtually entire populations of 53 of the lesser populated counties decided to preclude a majority of the State's qualified voters from nomi-

nating candidates of their choice. This does not appear likely. If such schemes ever came to light, the situation can be re-examined.

Thus, this Court finds that Section 10-3 of the Illinois Election Code, Ch. 46, Illinois Revised Statutes 1967, is an expression of rational state policy and that, therefore, it is constitutional under *MacDougall* v. *Green, supra.* As was pointed out in *Baker* v. *Carr, supra,* "*MacDougall* v. *Green,* (cite omitted), held only that in that case, equity would not act to void the State's requirement that there be at least a minimum of support for nominees for state-wide office, over at least a minimal area of the State." 369 U. S., at 234. This Court agrees with that course of action and follows the same in dismissing the present Complaint.

In sum, plaintiffs contend that, although the case of *MacDougall* v. *Green, supra,* is a direct precedent against their constitutional claims, the Supreme Court today would overrule *MacDougall* v. *Green* and that, in effect, we should hold this precedent not to be controlling. The short answer to this is that the Court itself has cited *MacDougall* v. *Green* in a number of recent decisions and has considered it to be a holding on its merits and has not set aside such a determination. We do not deem it to be our function to second guess and overrule a standing precedent in the identical case now before us. We believe that to be the sole prerogative of the Supreme Court and we respectfully decline to usurp that function.

JOHN S. HASTINGS,
Circuit Judge, United States Court of Appeals.

BERNARD M. DECKER,
Judge, United States District Court.

WILLIAM J. LYNCH,
Judge, United States District Court.

Dated: Oct. 3, 1968.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

JAMES L. MOORE, *et al.*, *Plaintiffs*,
vs.
SAMUEL SHAPIRO, *et al.*, *Defendants*.
No. 68 C 1569.

ORDER.

This action was brought before a three-judge District Court convened in the Northern District of Illinois under 28 U. S. C. §§ 2281 and 2284 by twenty-six independent candidates for the offices of Presidential and Vice Presidential electors from the state of Illinois. Defendants are the members of the Illinois Electoral Board.

On August 5, 1968 plaintiffs filed nominating petitions signed by 26,500 qualified voters pursuant to the provisions of Illinois Revised Statutes, Ch. 46 § 10-3. Defendants ordered the county clerks to refuse to certify plaintiffs for the November 5, 1968 General Elections because plaintiffs' petition did not comply with the provisions of Section 10-3 of Chapter 46, Illinois Revised Statutes 1967. This Section, along with Section 10-2 of the same Chapter, was amended in 1935 by the addition of the following qualification: "Provided that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two

hundred (200) qualified voters from each of at least fifty (50) counties."

Plaintiffs herein are seeking a Declaratory Judgment pursuant to 28 U. S. C. § 2201, holding the above proviso unconstitutional; declaring the action of the Electoral Board in refusing to order certification of plaintiffs by the county clerks null and void; and declaring plaintiffs' petition valid and sufficient for nomination. The Complaint further seeks an injunction under 28 U. S. C. § 2202, prohibiting defendants from refusing to certify plaintiffs to the county clerks for nomination.

Having jurisdiction of the subject matter and having considered the briefs and authorities submitted by the parties, the Court feels itself bound by *MacDougall* v. *Green*, 335 U. S. 281 (1948), wherein the Supreme Court upheld an identical provision, stating that "it is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality." 335 U. S. 283.

IT IS HEREBY ORDERED:

1. That the prayer for Temporary Injunction is denied

2. That the prayer for Declaratory Judgment is denied.

3. That the complaint is dismissed for failure to state a cause of action.

A memorandum decision will be issued soon.

ENTER:

JOHN S. HASTINGS,
Circuit Judge, United States Court of Appeals,

BERNARD M. DECKER,
Judge, United States District Court,

WILLIAM J. LYNCH,
Judge, United States District Court.

Dated: October 1, 1968.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 620

JAMES L. MOORE, et al.,

Plaintiffs-Appellants,

vs.

SAMUEL SHAPIRO, Individually and as Governor of the State of Illinois, et al.,

Defendants-Appellees.

(Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.)

MOTION TO DISMISS

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Of Counsel.

Printed by Authority of the State of Illinois

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 620

JAMES L. MOORE, et al.,

Plaintiffs-Appellants,

vs.

SAMUEL SHAPIRO, Individually and as Governor of the State of Illinois, et al.,

Defendants-Appellees.

(Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.)

MOTION TO DISMISS

Defendants Samuel Shapiro, Governor, Paul Powell, Secretary of State, Michael J. Howlett, Auditor of Public Accounts, Adlai E. Stevenson, III, Treasurer, William G. Clark, Attorney General, James A. Ronan, Chairman of the State Democratic Central Committee, and Victor L. Smith, Chairman of the State Republican Central Committee, by their attorney, William G. Clark, Attorney General of the State of Illinois, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move the Court to dismiss the appeal for the reasons set forth herein.

ARGUMENT

I.

THE APPEAL SHOULD BE DISMISSED BECAUSE OF THE IMPOSSIBILITY OF GRANTING ANY RELIEF.

Plaintiffs-Appellants, twenty-six independent candidates for the office of Presidential Electors from the State of Illinois, brought suit in the District Court to challenge the validity of Section 3 of Article 10 of the Illinois Election Code. (Ill. Rev. Stat., 1967, Chap. 46, Sec. 10-3). They sought a declaration that the statute was unconstitutional; that the action of the State Electoral Board in refusing to certify their names for a place on the Illinois ballot was null and void; and a preliminary and permanent injunction enjoining defendants-appellants from declining or refusing to certify their names as candidates for purposes of the November 5, 1968 election.

The General Election of November 5, 1968 has been held. At this election, electors for the offices of President and Vice-President of the United States for the State of Illinois were selected pursuant to Illinois law. Therefore, this appeal should be dismissed because of the impossibility of granting any relief to plaintiffs-appellants.

II.

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT.

In *MacDougall* v. *Green*, 335 U.S. 281 (1948), this Court held constitutional the same statutory requirement, chal-

lenged by plaintiffs-appellants, as applied to nominating candidates representative of a new political party.

What is challenged here is the Illinois requirement of a showing of statewide support for those seeking access to the Illinois presidential ballot by way of independent nominating petition. *MacDougall* stands for the proposition that a State may require that candidates for statewide office should have support not limited to a concentrated locality, (335 U.S., at 283) and that Illinois' method of demonstrating that support is reasonable.

The District Court properly concluded that the population distribution in Illinois had not changed significantly since 1948, and that *MacDougall* stands as a valid precedent on the question raised in this cause.

CONCLUSION

For the above reasons, defendants-appellees respectfully submit that this appeal should be dismissed.

Respectfully submitted,

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Counsel for Defendants-Appellees.

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THOMAS E. BRANNIGAN,
Assistant Attorneys General of Illinois,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 620

JAMES L. MOORE, ET AL.,
Plaintiffs-Appellants,

vs.

SAMUEL SHAPIRO, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF ILLINOIS, ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

STATEMENT OF PLAINTIFFS-APPELLANTS IN OPPOSITION TO MOTION TO DISMISS.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

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No. 620.

JAMES L. MOORE, ET AL.,
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vs.

SAMUEL SHAPIRO, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF ILLINOIS, ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

STATEMENT OF PLAINTIFFS-APPELLANTS IN OPPOSITION TO MOTION TO DISMISS.[1]

Pursuant to Rule 16 of the Rules of this Court, Appellants respectfully submit this Brief in opposition to the motion of Defendants-Appellees to dismiss the appeal.

---

1. It is perhaps worth noting that Appellees' motion was not timely filed. Appellants docketed their appeal on October 8, 1968. Rule 16 of this Court's Rules permits an appellee 30 days within which to file a motion to dismiss. Appellees' motion was filed November 8, 1968, thirty-one days after the docketing of Appellants' Jurisdictional Statement.

ARGUMENT.

CONTRARY TO APPELLEES' ASSERTION OF THE IMPOSSIBILITY OF GRANTING RELIEF, THIS COURT IS IN A POSITION TO GRANT MEANINGFUL RELIEF.

Appellants docketed this cause in this Court on October 8, 1968. On that same day, Appellants filed a "Motion to Advance and Expedite the Hearing and Disposition of this Cause." Appellees filed objections to that motion. On October 11, 1968 Appellants wired their response to those objections. On October 14, 1968, this Court entered the following order:

> Because of the representation of the State of Illinois that "It would be a physical impossibility for the State to effectuate the relief which the appellants seeks," the "Motion to Advance and Expedite the Hearing and Disposition of this Cause" is denied. Mr. Justice Fortas would grant the motion.

Appellees now urge, by their belated motion, that the entire challenge to Section 3 of Article 10 of the Illinois Election Code (Ill. Rev. Stat., 1967, Chap. 46, Sec. 10-3) be dismissed because the General Election of November 5, 1968 has been held and it has thus become impossible to grant any relief to Appellants.

This reasoning leads to a flagrantly outrageous result.

If Appellees' motion to dismiss is granted, a challenge to the constitutionality of the statute is made unreasonably difficult. There is no election-year method of challenging its validity other than the one adopted by Appellants; moreover, it is clear that there was here an expeditious

processing of the appeal. The Illinois Election Code (Ill. Rev. Stat., 1967, Chap. 46, See 10-6) provides for the filing of petitions as late as August 5th and action by the State Election Board *thereafter*. The State Electoral Board rejected Appellants' nominating petitions on August 16, 1968, and Appellants have diligently prosecuted this matter since that date. To accept the position of the Appellees is to preclude *any* meaningful election-year challenge to the Election Code. Clearly, such a result seems unacceptable.

The Appellants could not have moved much faster in the District Court than they did—given the tight time limitations built into the Illinois election laws. The State Electoral Board rejected Appellants' nominating petitions on August 16, 1968. The complaint was filed in the District Court *six days later*. Four days later Appellants went before the Chief Judge, who was then sitting as the emergency judge, for the purpose of having him advise the Chief Judge of the Court of Appeals of a case requiring the convening of a three-judge panel. The Chief Judge, in apparent contravention of 28 U. S. C. § 2284, declined to so advise the Chief Judge of the Court of Appeals and the issue was set down before another District Court judge for hearing on September 10, 1968. Thus, fifteen days expired during which the District Court took no action. Twenty more precious days elapsed before the three-judge court entered its order dismissing the complaint.

Now Appellees ask that Appellants pay for this delay by dismissing their complaint—on an issue of critical importance to the voters of Illinois which will occur again and again. The issue before the Court is not moot—the constitutional question concerning the provision of the Illinois Election Code requiring the signatures of at least 200 qualified voters in fifty counties is as viable today as it was in August. The voters of Illinois and future independent (and

new-party) candidates seeking a place on the ballot are still as much in the dark on this issue as they were in August of this year when that issue is measured against the recent decisions of this Court. The overriding issue has not disappeared by the election of November 5, 1968. It is still present and should be decided now. Illinois will have a state-wide election for treasurer in 1970. Ill. Const. Art. 5, § 3. Appellees seek not simply the dismissal of the complaint—but the dismissal of the issue.

In this case a compelling public interest demands that the issues raised be passed upon. The great weight of authority supports, either directly or by implication, the proposition that an appellate court may hear a case in which there is manifest public interest notwithstanding a suggestion that the case is moot. In *Southern Pac. Terminal Co.* v. *Interstate Commerce Com'n*, 219 U. S. 498 (1897), review was sought of an order of the Interstate Commerce Commission. By the time the case reached this Court, the order attacked had, by its own terms, expired. It was therefore urged that the case had become moot. In response, Mr. Justice McKenna, writing for a unanimous Court, wrote:

> In the case at bar the order of the Commission may to some extent . . . be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the Interstate Commerce Commission are usually continuing . . . and these considerations ought not to be, as they might be, defeated, by short-terms orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress. 219 U. S. at 515.

See also *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290 (1897); *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 (1938);

Federal Trade Commission v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257 (1938); *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37 (1944); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416 (1947).[2]

Here we are confronted with a question clearly public in nature. The probability that the situation will occur again is substantial, and thus a decision is needed for guidance of public officials and for prospective independent (and new-party) candidates. Unless this Court hears and determines the merits the decision of the three-judge district court below—a decision which relies *solely* on *MacDougall* v. *Green*, 335 U. S. 281 (1948)—will remain and thus breathe life into that case which, in the opinion of Appellants, has in reality long since been by-passed by this Court's "one man-one vote" decisions. In summary then, certain aspects of this case remain very much alive. This Court is thus capable of affording meaningful relief, not only to Appellants but to the citizens of the State of Illinois.

Furthermore, it is of course well-settled that where attendant questions remain, the case is not moot despite the fact that the principal questions may be so considered. *Fiswick* v. *United States*, 329 U. S. 211 (1946); *Heitmuller* v. *Stokes*, 256 U. S. 359 (1921). Here, Appellants, in addition to declaratory and injunctive relief, prayed for "such other and additional relief as may be just and proper." An individual improperly disenfranchised has a cause of

2. Both the Circuit Courts of Appeals and the courts of Illinois have long recognized the wisdom of not being bound by technical concepts of mootness. *Boise City Irr. & Land Co.* v. *Clark*, 131 F. 415 (9th Cir. 1904); *Dyer* v. *Securities and Exchange Comm.*, 266 F. 2d 33 (8th Cir. 1959); *Gay Union Corporation* v. *Wallace*, 71 App. D. C. 382, 112 F. 2d 192 (D. C. Cir. 1940); *Lansden* v. *Hart*, 180 F. 2d 679 (7th Cir. 1950); *People ex rel. Wallace* v. *Labrenz*, 411 Ill. 618, 104 N. E. 2d 769 (Sup. Ct. 1952), cert. den. 344 U. S. 824 (1952); *In Re Estate of Brooks*, 32 Ill. 2d 361, 205 N. E. 2d 435 (Sup. Ct. 1965); *Voisard* v. *County of Lake*, 27 Ill. App. 2d 365, 169 N. E. 2d 805 (1960); *Smith* v. *Ballas*, 335 Ill. App. 418, 82 N. E. 2d 181 (1948).

action for damages. *Smith* v. *Allwright*, 321 U. S. 649 (1944). Should not a like remedy be available to individuals wrongfully deprived of a position on a ballot by officials acting under color of an unconstitutional state law? Clearly, if the statute is unconstitutional, Appellants should be in a position to amend and pray for damages.

For the foregoing reasons, it is respectfully urged that this Court deny Appellees' motion to dismiss and proceed to a hearing on the merits.

Respectfully submitted,

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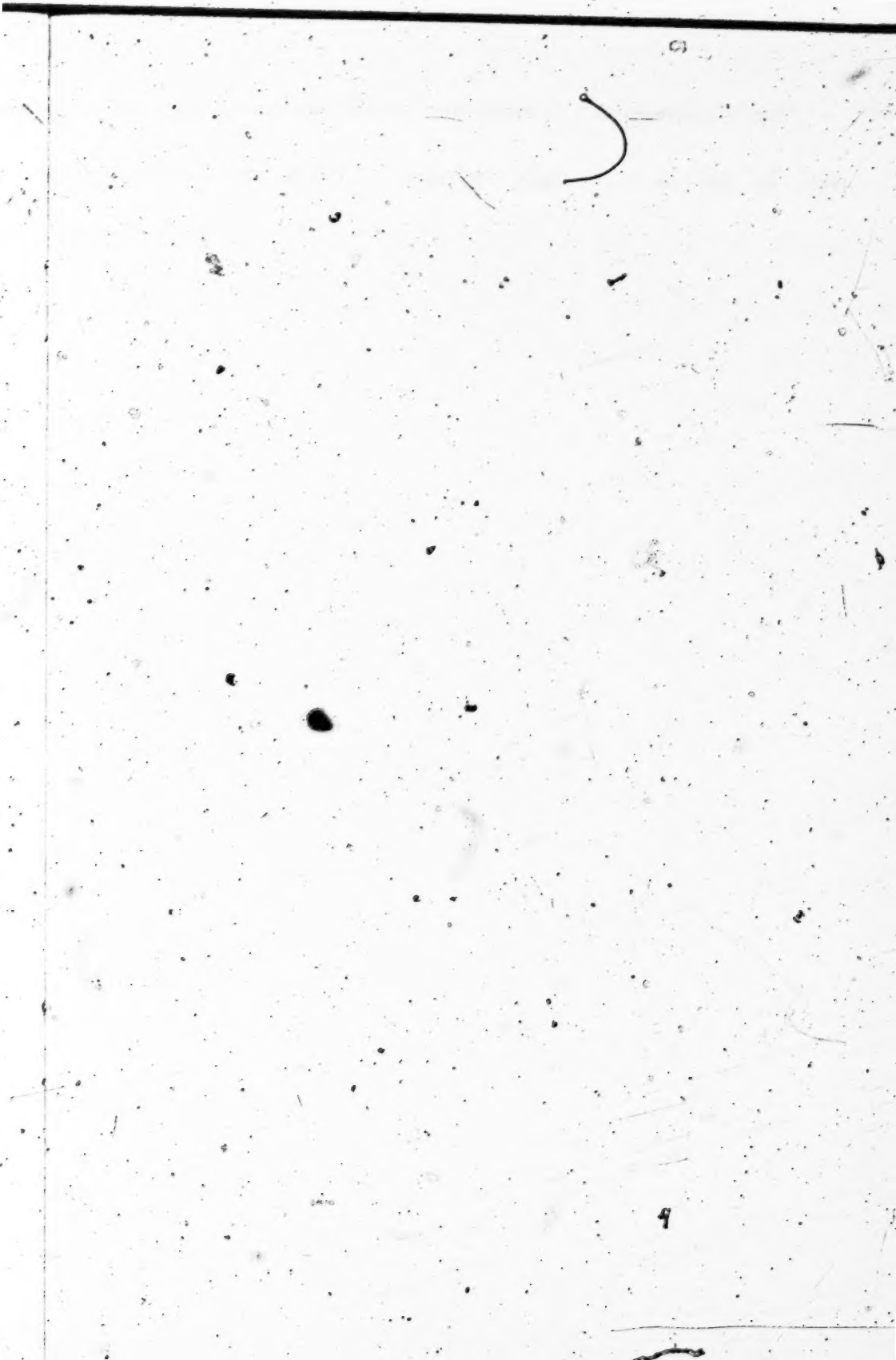

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 620

JAMES L. MOORE, ET AL.,

Plaintiffs,

vs.

SAMUEL SHAPIRO, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF ILLINOIS, ET AL.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANTS' BRIEF.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANTS' BRIEF.

OPINION BELOW.

The opinion below is not yet reported. A copy of the opinion is at pages 62-68 of the Appendix. The opinion was filed on October 3, 1968. The order of dismissal appealed from was entered on October 1, 1968.

JURISDICTION.

This is an appeal from an order entered on October 1, 1968 by a three-judge District Court in the Northern District of Illinois denying a request for preliminary injunc-

tive relief, denying a prayer for Declaratory Judgment, and dismissing the complaint for failure to state a cause of action. Notice of Appeal was filed on October 4, 1968. (Appendix, pp. 69-70.) A copy of the order appealed from is at pages 60-61 of the Appendix.

Jurisdiction of this Court to review the order on direct appeal is conferred by 28 U. S. C. Section 1253. (Appendix, p. 8.)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

This case involves a challenge to the constitutionality of Article 10, Section 3 of the Illinois Election Code on the ground that it violates Section 1 of Amendment XIV to the United States Constitution. (Appendix, p. 1.) The pertinent part of Article 10, Section 3 of the Illinois Election Code, as amended in 1935, reads as follows:

> Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; Provided, however, that included in the aggregate total of 25,000 signatures are the signatures of 200 qualified voters from each of at least 50 counties within the State.

QUESTIONS PRESENTED.

1. Is the Supreme Court's decision in *MacDougall* v. *Green*, 335 U. S. 281 (1948) still the law? Has not Justice Douglas' dissent in that case been adopted by this Court as a valid statement of the principles governing this cause?

2. Does the 1935 Amendment to Section 3 of Article 10 of the Election Code of Illinois, requiring that nomination

petitions for independent candidates for statewide office must contain not less than 200 signatures from each of at least 50 counties, constitute an arbitrary, unreasonable, and discriminatory restriction on the right of the Illinois voters to nominate and vote for candidates of their own choice in violation of Amendment XIV to the United States Constitution, and particularly the privileges and immunities, equal protection of the laws, and due process clauses thereof?

STATEMENT OF THE CASE.

This suit was filed as an action for Declaratory Judgment under Section 2201 of the Judicial Code and for injunctive relief as authorized by Section 2202 of the Judicial Code. (Appendix, p. 9.) It was brought by twenty-six independent candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois. The defendants were the members of the State of Illinois Electoral Board, namely, Samuel Shapiro, Governor, Paul Powell, Secretary of State, Michael J. Howlett, Auditor of Public Accounts, Adlai E. Stevenson, III, Treasurer, William G. Clark, Attorney General, James A. Ronan, Chairman of the State Democratic Central Committee, and Victor L. Smith, Chairman of the State Republican Central Committee.[1] The Board is provided for by Section 7-14 of the Illinois Election Code, Ill. Rev. Stat., Chap. 46, Sec. 7-14. (Appendix, pp. 2-3.)

Electors of President and Vice-President of the United States were to be voted on at the General Election to be held on November 5, 1968. On August 5, 1968, pursuant to Article 10 of the Illinois Election Code, Appellants filed petitions with Appellees containing the names of 26,500 qualified voters who desired to have Appellants nominated

1. In the election held on November 5, 1968, Richard B. Ogilvie was elected Governor and William J. Scott was elected Attorney General. They have since assumed office.

as independent candidates for the offices of Presidential Electors. Prior to 1935, Section 3 of said Article 10 required that at least 25,000 electors sign a petition to nominate such candidates. In 1935 that statute was amended. The requirement of at least 25,000 signatures was retained, but the following proviso was added:

> Provided, that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties. (Ill. Rev. Stat. 1967, Chap. 46, Sec. 10-3.) (Appendix, pp. 7-8.)

This section provides the only means whereby qualified voters in Illinois can nominate independent candidates for statewide office. An identical place of residence requirement is contained in Section 2 of Article 10 with respect to nominating candidates of a new political party for statewide office. (Appendix, pp. 4-7.)

On August 16, 1968 Appellees ruled that Appellants could not be certified to the county clerks for the November 5, 1968 General Election on the sole ground that the petition

> does not contain signatures of 200 qualified voters from each of at least 50 counties within the State. Said petition only contains 24 counties with over 200 signatures. Therefore, said petition does not meet with the requirements of Section 10-3. . . . (Exhibit A of Complaint, Appendix, pp. 21-23.)

On August 22, 1968 the Complaint in this cause was filed and assigned to Judge William J. Lynch. (Appendix, pp. 14-23.) The Complaint prayed for a Declaratory Judgment holding and declaring: that the amendment to Section 3 of Article 10 requiring 200 signatures from each of at least 50 counties is unconstitutional in violation of the Fourteenth Amendment to the United States Constitution; that the decision of the State Electoral Board with respect

to the insufficiency of the nominating petitions is null and void; and that such petitions are valid and sufficient at law to have Appellants' names certified to the county clerks as candidates for the offices of Electors of President and Vice-President. The Complaint further prayed for a decree under Section 2202 of the Judicial Code, enjoining Appellees from refusing to certify Appellants to the county clerks for such purpose. Finally, the Complaint requested that a three-judge court be convened at the earliest possible opportunity pursuant to Sections 2281 and 2284 of the Judicial Code (Appendix, pp. 9-11) since Appellants were asking that enforcement of a state statute be enjoined.

On August 26, 1968, pursuant to notice of motion mailed to Appellees on August 22, attorneys for Appellants appeared before Chief Judge William J. Campbell, who was hearing emergency motions, and moved that the District Court advise the Chief Judge of the Court of Appeals for the Seventh Circuit of the application for injunctive relief to the end that a three-judge court be convened pursuant to Sections 2281 and 2284 of the Judicial Code. Chief Judge Campbell declined to grant relief and set the motion down for hearing before Judge Lynch fifteen days thereafter on September 10. (Appendix, pp. 24-27.) Judge Lynch heard and granted the motion on September 11. (Appendix, pp. 27-30.)

Pursuant thereto a three-judge district court was convened. (Appendix, p. 31.) By order of Judge Lynch, briefs were submitted to the three-judge court on September 26, 1968. (Appendix, pp. 32, 38-58.)

Thereafter, without hearing oral argument, the three-judge court issued its order on October 1, 1968. (Appendix, pp. 60-61.) The essence of the court's reasoning is contained in the following paragraph:

> Having jurisdiction of the subject matter and having

> considered the briefs and authorities submitted by the parties, the Court feels itself bound by *MacDougall* v. *Green*, 335 U. S. 281 (1948), wherein the Supreme Court upheld an identical provision, stating that "it is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality." 335 U. S. 283.

The court denied the request for preliminary injunctive relief, denied the prayer for Declaratory Judgment, and dismissed the complaint for failure to state a cause of action. It is these rulings which are at issue in this appeal.

The three-judge court stated that a memorandum opinion would follow. On October 3, 1968 the three-judge court issued its memorandum opinion. (Appendix, pp. 62-68.) Although amplified somewhat, the reasoning was substantially identical to that contained in the order.

SUMMARY OF ARGUMENT.

I.

The 1935 amendment to Section 3 of Article 10 of the Illinois Election Code, by its requirements with respect to place of residence of voters, drastically dilutes the right of a majority of Illinois' qualified voters to nominate candidates for statewide office and for Presidential Electors. Such dilution violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. While the facts in the present case are virtually identical to those in *MacDougall* v. *Green*, 335 U. S. 281 (1948), relied on by the three-judge court in dismissing the complaint, subsequent decisions by this Court have adopted the dissent of Justice Douglas in the *MacDougall* case as a valid statement of the principles governing this cause.

II.

More than 50 per cent of the total Illinois population and more than 50 per cent of Illinois registered voters reside in just one of the State's 102 counties; approximately 61 per cent reside in the state's five most populous counties; and approximately 93.4 per cent reside in the state's forty-nine most populous counties. Approximately 6.6 per cent reside in the fifty-three remaining counties. The 1935 amendment to Section 3 of Article 10 of the Illinois Election Code requiring 200 signatures from each of 50 counties to nominate candidates for statewide office and for Presidential Electors drastically debases the weight of qualified voters in the more populous counties, enables a minority of the voters to prevent the nomination of candidates preferred by the majority, and constitutes an arbitrary, unreasonable, and discriminatory restriction on the right of Illinois voters to nominate and vote for candidates of their own choice.

III.

Prior to the 1935 amendment, the Illinois Election Code provided that 25,000 signatures of qualified voters, counted on a statewide basis, were required to nominate candidates for statewide offices and for Presidential Electors. Invalidation of the 1935 amendment which added the weighted requirement of 200 signatures from each of 50 counties would not nullify the Election Code but would leave it intact in its original form. Appellants have satisfied the requirements of the Election Code except for the unconstitutional requirements added by the 1935 amendment.

ARGUMENT.

I.

The 1935 Amendment to Section 3 of Article 10 of the Illinois Election Code Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The three-judge court, in dismissing Appellants' petition and denying all requested relief, relied solely on this Court's decision in *MacDougall* v. *Green*, 335 U. S. 281 (1948).

The facts presented in the present case are virtually identical to those present in *MacDougall*. They vary only in that in 1948 the five most populous Illinois counties had 59 per cent of the registered voters; in 1968 they had 61 per cent. In 1948 the forty-nine most populous counties had 87 per cent of the registered voters; in 1968 they had 93.4 per cent. As in the present case, Appellants in the *MacDougall* case were seeking to be certified to the county clerks for a Federal and statewide election without obtaining 200 signatures from each of 50 counties as required by the 1935 amendment to Article 10 of the Illinois Election Code.

While the facts in the two cases are virtually identical, in the twenty years since the *MacDougall* case, the law has changed considerably. In the *MacDougall* case this Court, by a vote of six to three, affirmed the District Court's denial of an interlocutory injunction and dismissal of the complaint on the basis of *Colegrove* v. *Green*, 328 U. S. 549 (1946), and *Colegrove* v. *Barrett*, 330 U. S. 804 (1946). Justice Rutledge concurred with the majority on the ground

that the Court should decline to exercise its jurisdiction in equity. Justice Douglas, with whom Justices Black and Murphy concurred, dissented, and it seems manifest that the statement of the law urged in that dissent is now the law of the land.

It may be that Justice Frankfurter's opinion at page 554 in the 1946 *Colegrove* case that judicial enforcement of equality of voting power would constitute "pernicious . . . judicial intervention in an essentially political contest dressed up in the abstract phrases of the law" actually stated the ruling of that case. If it did, this Court, in the 1962 case of *Baker* v. *Carr*, 369 U. S. 186 (1962), drastically changed the focus for viewing cases which involve political issues. The question in such cases, said this Court at page 226, "is the consistency of state action with the Federal Constitution." This Court held that complainant's allegation that the state's apportionment act resulted in a classification of voters which favored those in some counties over others presented a justiciable cause of action under the equal protection clause of the Fourteenth Amendment.

Since the *Baker* decision, this Court and many District Courts have held numerous state statutes which classified voters and weighted votes on the basis of place of residence for purposes of nomination or election to be unconstitutional, enjoined their enforcement, and ordered elections consistent with the principle of one man, one vote. (See Annotation, "Inequalities in Population of Election Districts or Voting Units as Rendering Apportionment Unconstitutional," 12 L. ed. 2d 1282.)

In *Reynolds* v. *Sims*, 377 U. S. 533 (1964), this Court affirmed the holding of a three-judge court that the existing and proposed apportionment provisions for the Alabama legislature were unconstitutional because they conflicted with the equal protection clause of the Fourteenth

Amendment, and affirmed its order for a temporary reapportionment. The existing and proposed statutes apportioned state representatives and senators among districts and counties so that voters in the more populous counties did not elect their proportionate share of representatives and senators. As stated at 377 U. S. 555:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

This Court dealt squarely with the unconstitutionality of place-of-residence requirements such as that of the 1935 amendment to the Illinois Election Code. "Diluting the weight of votes because of place of residence," it said at page 566, "impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race. . . ." Not place of residence but "population," this Court held at page 567, "is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies."

This Court has left no doubt as to how the issues in *MacDougall v. Green*, 335 U. S. 281 (1948), were to be decided under the law as stated in the *Reynolds* case. In footnote 40 at page 563 in the *Reynolds* case, the Court quoted as follows from Justice Douglas' dissent in the *MacDougall* case:

> (A) regulation . . . (which) discriminates against the residents of the populous counties of the state in favor of rural sections . . . lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.
>
> Free and honest elections are the very foundation of our republican form of government. . . . Discrimina-

> tion against any group or class of citizens in the exercise of these constitutionally protected rights of citizenship deprives the electoral process of integrity. . . .
>
> None would deny that a state law giving some citizens twice the vote of other citizens in either the primary or general election would lack that equality which the Fourteenth Amendment guarantees. . . . The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government.

Gray v. *Sanders*, 372 U. S. 368 (1963), held that the Georgia county-unit system in statewide primary elections was unconstitutional since it resulted in a dilution of the weight of some votes merely because of where the voters resided. As this Court said at pages 557-58:

> How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

Here, the geographical unit chosen for nomination and election of Presidential Electors is the State of Illinois. All registered voters must have equal power to nominate and elect, "wherever their home may be in the geographical unit."

In Illinois, the use of nominating petitions by independent candidates to obtain a place on the ballot under Article 10 of the Election Code is as much an integral part of the whole elective system as are the primary provisions for

established parties set out in Articles 7, 8, and 9 of that Code. Article 10 of the Illinois Election Code contains the only procedure for the nomination of candidates by voters who are not members of established political parties. It permits the formation of new parties and the nomination of independent candidates by nominating petitions.

The Illinois Supreme Court has recognized explicitly the role of the nominating process in the elective process. In *People* v. *Election Commissioners,* 221 Ill. 9, 18 (1906), the Court stated unequivocally:

> The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen, *and is of precisely the same nature.* (Emphasis added.)

Similarly, in *People* v. *Fox,* 294 Ill. 263 (1920), the Illinois Supreme Court held the Primary Act of 1919 unconstitutional as contrary to Section 18 of Article II of the Illinois Constitution, saying at page 268:

> Section 18 of the bill of rights provides that all elections shall be free and equal. This language has been construed by this court as meaning that the vote of every qualified elector shall be equal in its influence with every other one. . . . It is well settled in this state that the term 'election' applies to a primary for the nomination of candidates as well as to the election of such candidates to office, and the right to choose candidates for public office, whose names are to be placed on the official ballot, has been held as valuable as the right to vote for them after they are chosen and is of precisely the same nature.

It is well settled that, where a party primary is an integral part of the procedure of election, the right to vote in a primary is a right protected by the United States Constitution. *United States* v. *Classic,* 313 U. S. 299, 314-318

(1941). In *Smith* v. *Allwright*, 321 U. S. 649, 664 (1944), this Court stated:

> When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election.

Following *Baker* v. *Carr*, 369 U. S. 186 (1962), this Court has applied the same tests to determine the character of discrimination or abridgment in statutes governing the nomination of candidates as in their election. As already noted, *Gray* v. *Sanders*, 372 U. S. 368 (1963), found unconstitutional a county-unit system in statewide primary elections. There, at pages 374-75, it was held that "state regulation of this preliminary phase of the election process makes it state action" within the meaning of the Fourteenth Amendment.

Williams v. *Rhodes* and *Socialist Labor Party* v. *Rhodes*, 89 S. Ct. 5 (1968) held that the Ohio election laws placed an unconstitutional burden on the rights of minority groups to obtain a place on the ballot. *Toombs* v. *Fortson*, 205 F. Supp. 248 (DC Ga., 1962), held unconstitutional a statute which rotated senatorial seats among the counties and permitted only voters in the county selecting the state senator to vote in the primary nominating the senator.[1] *Moore* v. *Moore*, 229 F. Supp. 435 (DC Ala., 1964), held unconstitutional a statute which provided for election of congressmen at-large but which provided for nomination of congressional candidates from districts with unequal populations.

As Justice Douglas stated in his dissent in *MacDougall* v. *Green*, 335 U. S. 281 (1948), at page 288:

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1. *Fortson* v. *Toombs*, 379 U. S. 621 (1965) vacated a part of the decree and remanded the case to the District Court for reconsideration of the desirability and need for the ongoing injunction.

> The protection which the Constitution gives voting rights covers not only the general election but also extends to every integral part of the electoral process, including primaries. (Citing cases.) When candidates are chosen for the general election by a nominating petition, that procedure also becomes an integral part of the electoral process. It is entitled to the same protection as that which the Fourteenth Amendment grants any other part.

Although the facts in the present case are virtually identical to those in *MacDougall* v. *Green*, the foregoing review of some of the leading cases subsequent to *Baker* v. *Carr* makes it evident that the holding in *MacDougall* no longer determines the issues in the present case. In *MacDougall* v. *Green*, this Court held at page 283:

> It is clear that the requirement of two hundred signatures from at least fifty counties gives to the voters of the less populous counties of Illinois the power completely to block the nomination of candidates whose support is confined to geographically limited areas. But the State is entitled to deem this power not disproportionate: of 25,000 signatures required, only 9,800, or 39%, need be distributed; the remaining 61% may be obtained from a single county. And Cook County, the largest, contains not more than 52% of the State's voters. It is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality.

All that remains of that holding is the conclusion that the 1935 amendment does enable voters from less populous counties to block the nomination of candidates whose support is confined to a majority of the population which resides in geographically limited areas. It is no longer allowable State policy to permit a minority of the voters, simply because of where they reside, to block the nomination of candidates supported by a majority.

"Citizens," said the Court at page 580 in *Reynolds* v.

Sims, 377 U. S. 533 (1964), "not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations."

Since the "right to vote freely for a candidate of one's choice is of the essence of a democratic society," as this Court said at page 555 of *Reynolds* v. *Sims*, *supra*, then the method of choosing that candidate must meet the test of the equal protection clause of the Fourteenth Amendment. Under the 1935 amendment to Article 10 of the Illinois Election Code, petitions signed by every one of the 93.4 per cent of the state's qualified voters who reside in the most populous counties could not nominate a single candidate for Presidential Elector. On the other hand, petitions signed by 25,000 of the 6.6 per cent of the state's qualified voters properly distributed in fifty of the fifty-three least populous counties could nominate a complete slate of candidates. Such classification of voters on the basis of where they live is contrary to the equal protection clause of the Fourteenth Amendment and is, therefore, unconstitutional.

II.

The 1935 Amendment to Section 3 of Article 10 of the Election Code Requiring 200 Signatures from Each of 50 Counties to Nominate Candidates for Statewide Offices and Presidential Electors Constitutes an Arbitrary, Unreasonable, and Discriminatory Restriction on the Right of Illinois Voters to Nominate and Vote for Candidates of Their Own Choice.

As discussed above, the *sole* authority on which the three-judge court relied in upholding Section 3 of Article 10 has, through a long series of decisions of this Court, been thoroughly undercut. However, there are additional reasons which mitigate against the continued viability of the *MacDougall* case.

The requirement here in issue was added by amendment in 1935. *Laws*, 1935, p. 789. Before that amendment, the signatures required to nominate independent candidates for statewide offices, and for Presidential Electors, were counted on a statewide basis and only in terms of the total to be obtained: 25,000 signatures of qualified voters in the state. The requirement for nominating candidates of a new political party was identical.

The 1935 amendment added an additional and weighted requirement based on the place of residence of the registered voters. The 1935 amendment made it mandatory that the 25,000 qualified voters meet a further, and, in view of the population distribution in Illinois, highly unequal requirement as to their place of residence within the statewide geographical unit for which candidates were to be elected. The 25,000 signatures must include those of at least 200 qualified voters from each of 50 counties. In other words, under the 1935 amendment, the signatures of neither 25,000 qualified voters nor of 4,000,000 qualified voters will satisfy the statutory requirement for nomina-

tion of independent or new-party candidates unless they meet place-of-residence requirements contrary to the population-based requirements of the Fourteenth Amendment.

The distribution of population among the 102 Illinois counties shows the extent to which the 1935 amendment debases and dilutes the right of qualified voters to participate in the electoral process.

More than 50 per cent of the total Illinois population and more than 50 per cent of the Illinois registered voters reside in *one* county, Cook County.

Approximately 61 per cent of the Illinois registered voters reside in the state's *five* most populous counties: Cook, DuPage, Lake, Madison, and St. Clair.

Approximately 93.4 per cent of the Illinois registered voters reside in the state's *forty-nine* most populous counties: Cook, DuPage, Lake, Madison, St. Clair, Adams, Bureau, Champaign, Christian, Clinton, Coles, DeKalb, Franklin, Fulton, Hancock, Henry, Iroquois, Jackson, Jefferson, Kane, Kankakee, Knox, La Salle, Lee, Livingston, Logan, Macon, Macoupin, Marion, McDonough, McHenry, McLean, Montgomery, Morgan, Ogle, Peoria, Randolph, Rock Island, Saline, Sangamon, Shelby, Stephenson, Tazewell, Vermillion, Whiteside, Will, Williamson, Winnebago and Woodford.

Approximately 6.6 per cent of Illinois registered voters reside in the *fifty-three* remaining counties.

The 1935 amendment thus prevents the majority of the state's registered voters who reside in Cook County from nominating independent candidates for Presidential Electors and statewide offices or from forming a new political party in the state for those purposes.

The 1935 amendment also prevents the 61 percent of the state's registered voters who reside in Cook, DuPage, Lake, Madison, and St. Clair Counties from nominating independent candidates for Presidential Electors and state-

wide offices or from forming a new political party in the state for those purposes.

The 1935 amendment even prevents the 93.4 per cent of the state's registered voters who reside in the state's forty-nine most populous counties from nominating independent candidates for Presidential Electors and statewide offices.

But the 1935 amendment permits 25,000 of the remaining 6.6 per cent of the registered voters properly distributed among fifty of the fifty-three least populous counties to nominate such candidates or to form such a new party.

The effect of the 1935 amendment is drastically to debase the weight of a qualified voter in a populous county as against the weight of a qualified voter in the less populated counties. No number of additional signatures over and above the required 200 in a populous county can overcome the lack of 200 in one of the less populated counties. One qualified voter does not have the same right to nominate as every other qualified voter. His signature on a nominating petition counts only if he resides in the right county. And the smaller the population of the county in which he resides, the more his signature counts.

The grotesque nature of the 1935 amendment to Article 10 of the Illinois Election Code is illustrated by the fact that the voters of Cook County, since they outnumber the voters of all the rest of the counties put together, could elect the Presidential Electors, a United States Senator, and various statewide officers in the face of the united opposition of the voters of the other 101 counties. Indeed, the existence of such a possibility is required by the Fourteenth Amendment to the United States Constitution.

Nevertheless, although that majority can elect, under the Illinois Election Code it cannot nominate. Although the minority cannot elect, it can nominate.

In fact, the majority cannot really elect in Illinois. The power of a majority to elect must mean the power to elect candidates of its and not the minority's choice. Since the majority cannot nominate candidates without the support of the minority, it can only elect candidates the minority has also agreed to choose.

Indeed, since in Illinois the majority alone cannot nominate and the minority alone can nominate, it is possible for the only candidates on the ballot to have been nominated by the minority. The majority will thus have been effectively deprived of its vote and the minority will elect its candidates.

It is clear, therefore, that the 1935 amendment to Article 10 of the Illinois Election Code heavily overweighs the electoral power of voters residing in less populous counties and greatly underweighs the electoral power of voters residing in the populous counties. The 1935 amendment deviates drastically from the rule of one man, one vote.

The three-judge court seeks solace from these inescapable facts in this Court's decision in *Dusch* v. *Davis*, 387 U. S. 112 (1967). In that case, this Court upheld a so-called "Seven-Four Plan" establishing residency requirements for prospective candidates for the City Council of a governmental unit of seven boroughs composed of what had formerly been the City of Virginia Beach and Princess Anne County. However, the crucial distinction between that case and the one at bar was emphasized by Mr. Justice Douglas, writing for the Court, when he noted that "the plan uses boroughs in the city 'merely as the basis of residence for candidates, not for voting or representation.' " 387 U. S. at 115. The provision of the Illinois Election Code here under attack does not establish residency requirements for candidates seeking statewide office. Rather, it directly affects the weight of the vote of citizens of the state based on their respective places of residence. It thus suffers

the precise infirmity which Justice Douglas failed to find in the *Dusch* case. It is submitted that the distinction between the two cases is obvious.

III.

The Invalidation of the 1935 Amendment Would Leave the Illinois Election Code Intact in Its Original Form. Appellants Have Fulfilled the Constitutional Requirements of That Code.

The only provision assailed as unconstitutional in this suit is the 1935 amendment to Article 10 of the Illinois Election Code which requires that 200 signatures be obtained from each of 50 counties. The invalidation of this amendment as unconstitutional would not nullify the entire Illinois Election Code. Instead, it would leave the legislation intact in its original form. *People* v. *Alteric*, 356 Ill. 307 (1934). The Code would then require that 25,000 qualified voters sign a petition to nominate independent candidates for Presidential Electors regardless of their place of residence.

Appellants presented such a petition to the State Electoral Board. That Board refused to certify Appellants to the county clerks solely because the petition failed to satisfy the unconstitutional place of residence requirements of the 1935 amendment. (Exhibit A to Complaint, Appendix, pp. 21-23.) Appellants, therefore, had fulfilled the constitutional statutory requirements for certification and should have been certified to the county clerks as candidates for Electors of President and Vice President of the United States.

CONCLUSION.

The cases of *Baker* v. *Carr*, 369 U. S. 186 (1962), *Gray* v. *Sanders*, 372 U. S. 368 (1963) and *Reynolds* v. *Sims*, 377 U. S. 533 (1964), as well as the many election cases which have followed, have settled that the district courts have jurisdiction of a suit such as this which attacks a state statute as unconstitutional on the ground that it deprives persons of equal protection of the laws by debasing and diluting their right to nominate and vote; that such suits state a justiciable cause of action; that persons such as Appellants have standing in such suits to challenge state statutes as unconstitutional for violating the Fourteenth Amendment; and that declaratory and injunctive relief are appropriate remedies in such suits.

For all of the reasons stated above, Appellants respectfully submit that their prayer for declaratory and injunctive relief as set forth in their Complaint should have been granted and that the three-judge court erred in dismissing the cause.

It is, of course, too late for Appellants to be placed on the 1968 presidential ballot. Appellants challenged the validity of Section 3 of Article 10 of the Illinois Election Code as expeditiously as possible in view of that Code's provisions with respect to the time for filing nominating petitions. This Court denied Appellants' "Motion to Advance and Expedite the Hearing and Disposition of This Cause" because of the representations of the State of Illinois that "it would be a physical impossibility for the State to effectuate the relief which the appellants seek."

There is no election-year method of challenging the validity of the Election Code other than the one adopted by Appellants. Because of the Code's provisions with respect to the time for filing nominating petitions, a similar

challenge in 1970 or 1972 will be met with the identical representation by the State of the "physical impossibility for the State to effectuate the relief" of placing the names of independent candidates on the ballot. The overriding issue of the unconstitutionality of the Code provision which heavily overweights the electoral power of voters residing in less populous counties has survived the 1968 election. That provision will deprive the majority of Illinois voters of their right to an equal vote in subsequent elections unless this Court reverses the decision of the three-judge court.

Respectfully submitted,

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SUBJECT INDEX

Table of Authorities Cited

STATUTES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1968

No. 620

JAMES L. MOORE, et al.,

Plaintiff-Appellants,

vs.

SAMUEL SHAPIRO, Individually and as Governor of the State of Illinois, et al.

Defendants-Appellees.

(Appeal from the United States District Court for the Northern District of Illinois.)

BRIEF FOR APPELLEES.

QUESTIONS PRESENTED.

1) Whether the 1935 Amendment to Section 10-3 of the Illinois Election Code (Ill. Rev. Stat. 1967, Ch. 46, Par. 10-3) requiring among other things, that an individual seeking nomination for state wide office, must obtain at least 200 signatures upon his petitions from at least 50 counties, is a constitutional state election policy.

2) Whether the principles enunciated in *Reynolds* v. *Sims*, 377 U.S. 533, and *Gray* v. *Sanders*, 372 U.S. 368, pertaining to the debasement of voters in legislative and representative elections is applicable to nominating statutes where no election is required for a place on the ballot?

3) Whether the constitutionality of the 1935 Amendment to Section 10-3 is governed by the principle of whether an unreasonable burden has been placed upon an individual attempting to obtain a place on the ballot in the general election as contemplated in *Williams* v. *Rhodes*, 89 S. Ct. 3?

4) Whether the remedy suggested by the plaintiffs would negate the public policy of allowing individuals and new political parties a place on the ballot in this state?

SUMMARY OF ARGUMENT

Samuel Shapiro, Individually and as Governor of the State of Illinois, et al. submits that the decision of the United States District Court for the Northern District of Illinois should be affirmed for:

(1) The provision contained in the 1935 Amendment to Section 10-3 of the Illinois Election Code (Ill. Rev. Stat. 1967, Ch. 46, Par. 10-3) requiring that an individual seeking nomination for state wide elective office, to obtain among other things, at least 200 signatures on his petitions in at least 50 counties is a reasonable exercise of state policy. *MacDougall* v. *Green*, 335 U.S. 281 (1948).

(2) The doctrine of one-man, one-vote, applied in representative and legislative elections, is not applicable to the 1935 Amendment to Section 10-3 because

there is no requirement that the nomination be predicated upon an election.

(3) That the nominating provisions of the Illinois Election Code (Sections 10-2, 10-3, 21-1) do not create an invidious discrimination as contemplated by this Court under *Williams* v. *Rhodes*, 89 S.Ct. 3.

(4) That the relief requested by the plaintiffs would negate the public policy of permitting individuals and new political parties an opportunity to gain a place on the ballot in this state.

ARGUMENT

I.

THE ILLINOIS ELECTION CODE REQUIREMENT THAT AN INDIVIDUAL SEEKING NOMINATION FOR A STATE WIDE OFFICE OBTAIN PETITIONS CONTAINING 25,000 SIGNATURES, WITH AT LEAST 200 SIGNATURES FROM 50 COUNTIES, IS A CONSTITUTIONAL EXERCISE OF STATE ELECTION POLICY.

Of all subjects debated, editorialized and discussed during the past year, the mode of electing the President and Vice-President of the United States through our Electoral College, was one of the most topical and politically important.

The instant case is concerned with the manner of nominating Electors of the President and Vice-President in the State of Illinois under the provisions of the present Illinois Election Code (Ill. Rev. Stat., 1967, Ch. 46, Pars. 1, *et seq.*).

Statutory Method of Nomination of Electors.

The Constitution of the United Statees, Article II, Section 1, Clause 2, provides:

> "Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of Trust or Profit under the United States, shall be appointed an Elector."

Pursuant to the aforementioned constitutional grant of power, the General Assembly of the State of Illinois has

authorized the nomination of electors of the President and Vice-President of the United States in the following manner:

1) The electors to be presented by an established political party[1], at the general election are nominated and certified to be placed upon the ballot by party convention. Section 21-1 of the Election Code (Ill. Rev. Stat. 1967, Ch. 46, Par. 21-1). (Appendix to Br. p. xvii)

2) A new political party may nominate its electors, to be placed upon the ballot in the general election, by obtaining petitions signed by not less than 25,000 qualified voters, provided, however, said petitions contain the signatures of 200 qualified voters from each of at least 50 counties within the state. Section 10-2 of the Election Code (Ill. Rev. Stat. 1967, Ch. 46, Par. 10-2). (Appendix to Br. p. xii)

3) Individual candidates for elector may be placed upon the ballot in the general election by obtaining petitions containing the signatures of not less than 25,000 qualified voters, provided, however, that included in the aggregate are the signatures of 200 qualified voters from each of at least 50 counties within the State. Section 10-3 of the Election Code (Ill. Rev. Stats. 1967, Ch. 46, Par. 10-3). (Appendix to Br. p. xv)

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1 An "established political party" is a party which at the last general election for State and county offices, polled for its candidate for Governor more than 5% of the entire vote cast for Governor. Section 10-2 of the Election Code (Ill. Rev. Stat. 1967, Ch. 46, Par. 10-2). (Appendix to Br. p. xii).

Nature of this Proceeding.

This action was brought by twenty-six independent candidates for the office of Presidential and Vice-Presidential electors from the State of Illinois (App. 14). They alleged that they were improperly denied a place on the ballot in that the requirement of obtaining 200 signatures from at least 50 counties (Section 10-3 of the Election Code) is unconstitutional in that it debased the vote of those residing in the larger counties of the state.

The constitutionality of Section 10-2 of the Election Code providing for the nomination of a new political party was the salient issue in *MacDougall* v. *Green,* 335 U.S. 281 (1948) in which this Court held the requirement of 200 signatures from at least 50 counties was a valid state policy.

The plaintiffs argue that the decision of this Court in the *MacDougall* case has been overruled by *Baker* v. *Carr,* 369 U.S. 186 (1962), and therefore is not the existing law. (Appt's. Br. p. 6). Rather than overruling *MacDougall, Baker* held that the District Court had jurisdiction of such claims and cited *MacDougall* as authority for said proposition. In relation thereto, Mr. Justice Clark stated in *Baker* (pp. 251, 252):

> "I take the law of the case from *MacDougall* v. *Green,* 335 U.S. 281 (1948), which involved an attack under the Equal Protection Clause of an Illinois election statute. The Court decided that case on its merits without hindrance from the 'political question' doctrine. Although the statute under attack was upheld, it is clear that the Court based its decision upon the determination that the statute represented a rational state policy."

The issue presented in the instant case is identical to that presented in *MacDougall* with the exception, that the obtaining 25,000 signatures of which 200 must be from 50 different counties, applies to individuals rather than to a new political party. This represents "rational state policy" now as well as when the Court first considered the proposition in *MacDougall.*

Possible Constitutional Violation in Relation to Election Laws.

Constitutional attacks upon election laws in general fall into three separate classifications;

1) The debasement of an individual's vote by the estabishment of disproportionate populated districts in legislative or representative elections. *Reynolds* v. *Sims,* 377 U.S. 533 (1964).[3]

2) The disenfranchisement of a voter through the denial of the right to vote because of race, sex or lack of property as now prohibited by the Fifteenth, Nineteenth and Twenty-Fourth Amendments to the Constitution of the United States.

3) The invidious discrimination through the statutory imposition of substantial burdens on an individual or new political party to gain a place upon the Ballot for election. *Williams* v. *Rhodes,* 89 S. Ct. 3 (1968).

Application of Constitutional Provisions.

The plaintiffs allege that the 1935 Amendment to Section 10-3 of the Election Code (Ill. Rev. Stat. 1967, Ch. 46, Par. 10-3) (Appendix to Br. p. xv) is unconstitutional in that it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Appt's. Br. p. 15)

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3 See also: *Martin* v. *Bush,* 376 U.S. 222 (1964); *Lucas* v. *Forty-Fourth General* 377 U.S. 713 (1964); *Swann* v. *Adams,* 378 U.S. 553 (1964); *Meyer* v. *Thigpen,* 378 U.S. 554 (1964); *Davis* v. *Mann,* 377 U.S. 678 (1964); *Williams* v. *Moss,* 378 U.S. 558 (1964).

Plaintiffs' argument is based upon the assumption that the doctrine of "one-man, one-vote" expressed in legislative apportionment cases (See *Reynolds* v. *Sims*, 377 U.S. 533, and *Gray* v. *Sanders*, 372 U.S. 368) is applicable in the case at bar. They urge the 1935 Amendment enables voters from less populous counties to block the nomination of candidates whose support is confined to a majority of the population which resides in geographical limited areas and therefore debases the vote of those residing in the large populated counties. (Appt's. Br., p. 14).

The defendants agree with the principles of the doctrine of "one-man one-vote" and the prohibition of disenfranchisement of a voter and readily admit that they apply equally to primary as well as general elections. *United States* v. *Classic*. 313 U.S. 299, 314; *Smith* v. *Allwright*, 321 U.S. 649; *People* v. *Fox*, 294 Ill. 263. However, this Court has has not extended these principles to the nominating processes enacted by legislatures pursuant to Article II, Section 1, Clause 2 of the United States Constitution which do not require a competitive election in order to gain a place upon the ballot for general election and should not so extend them. In the State of Illinois the electors of the President and Vice-President of the United States are placed upon the printed ballot of the general election by either party convention or nominating petition and not by election. Sections 10-2, 10-3 and 21-1 of the Election Code (Ill. Rev. Stat. 1967, Ch. 46, Pars. 10-2, 10-3 and 21-1) (Appendix to Br. p. xvii).

The question actually presented here is not the application of one-man, one-vote, or the disenfranchisement of a voter but rather whether the legislature has created a burden which for all practical purposes forecloses an indi-

vidual from obtaining a place on the printed ballot in a general election. If the legislature has so acted, its enactment can be nothing less than invidious discrimination and thus unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States. However, such is not the situation in the case at bar.

This Court in *Williams* v. *Rhodes,* 89 S.Ct. 3, (1968) struck down the nominating procedure for new political parties in the State of Ohio, because "Ohio, through the entangling web of election laws, has effectively foreclosed its presidential ballots to all but Republicans and Democrats."

Unlike the situation in the apportionment cases, the case at bar and the *Williams* case are not primarily concerned with the debasement or disenfranchisement of a voter, but rather of the prohibition placed against one attempting to seek public office. It is he, rather than the voter, who is the recipient of any direct harm. True the Court in *Williams* stated that the voter is deprived of the opportunity to vote for these new parties, yet it is the party which is primarily damaged.

In comparing the Ohio statute to those in Illinois, we believe there is little if any similarity in its effect upon one seeking office. [Facts cited relating to Ohio election procedures are contained in *Williams* v. *Rhodes,* 89 S.Ct. 3 (1968)].

In Ohio, an individual could not through any means except the write-ins receive votes. In Illinois, Section 10-3 permits him to be placed upon the printed ballot.

For a new political party, the Ohio statute requires that they garner 15% of the total vote cast in the last general election (In the *Williams* case, 433,100 signatures), while in Illinois a new party or individual is merely required to obtain 25,000 signatures or approximately a half of 1%

(Total vote cast in the 1964 General Election was 4,805,928. Official Canvass Secretary of State.) of the total voting in the last general election.

In Ohio the new party is required to obtain signatures of 15% of the number of those who voted in the last general election, while an established political party is one which received 10% of the vote of the last general election, thus placing a greater numerical burden on the new party in Ohio than on any established one. Conversely, in Illinois an "established political party" is one which received 5% of the votes at the last general election. (Sec. 10-2 of the Election Code (Ill. Rev. Stat. 1967, Ch. 46, Par. 10-2), (Appendix to Br. p. xii) while a new party or an individual is required to obtain only one-half of 1% of the number who voted in the last general election.

The Ohio statute requires the new party after obtaining the necessary amount of signatures to set up complicated party structure in order to nominate its candidates or electors. No such requirement is placed upon the new individuals or parties by the Illinois statutes.

In the foregoing, it is apparent that the requisites to be met under the Ohio statute are far more onerous than those presented in the case at bar.

It is reasonable and sound legislative policy for a state to set some *criteria* to be met before a new political party or individual may be placed upon a printed elected ballot. If none existed, chaos may well reign. The requisite of obtaining only one-half of 1% of the number that voted in the last general election and the obtaining of 200 signatures from 50 different counties does not present a serious problem to anyone seeking a statewide office.[4]

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4 It is of interest to note that the electors of George C. Wallace qualified under the requisites of Illinois statutes.

The majority of this Court in *MacDougall* v. *Green*, 335 U.S. 281, properly held that the state had the right to set up reasonable standards to be met and that the demonstration of some state-wide support under the circumstances was reasonable. The Court therein further noted that other jurisdictions also employ similar requisites.

The defendants submit that the statutes enacted pursuant to the Constitution of the United States, Article II, Section 1, Clause 2 for the election of electors for the President and Vice President are reasonable and that since the method of nomination of these electors does not require the utilization of the election machinery in that the vote of the people is not required for nomination, the apportionment decisions are not applicable.

The defendants submit that the sole question to be answered is whether the General Assembly of the State of Illinois has effectually blocked efforts by new parties and individuals to seek elective office in the State of Illinois under the pertinent statutes. The defendants submit that reason, comparison with other statutory requirements such as Ohio, and the fact that over the years the statute has not proved to be seriously detrimental, establishes that the requirement of Section 10-3 do not create an invidious discrimination against new political parties or individuals in derogation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

II.

THE REMEDY SUGGESTED BY THE PLAINTIFFS WOULD NEGATE THE POLICY OF ALLOWING INDIVIDUALS AND NEW POLITICAL PARTIES A PLACE ON THE BALLOT IN THIS STATE.

The plaintiffs relying upon the principles set forth in the appointment cases argue that the 1935 Amendment to Section 10-3 of the Election Code (Ill. Rev. Stat. 1967, Ch. 46, Par. 10-3) is violative of the fourteenth Amendment to the Constitution of the United States because an individual or new party could be nominated by approximately 6.6% of the Illinois Registered voters under the present statute (Section 10-3) and that it also could prevent 61% of the state's registered voters residing in Cook, DuPage, Lake, Madison and St. Clair Counties from nominating independent candidates for presidential electors. (Applt. Br., p. 17).

Assuming for the moment that their position is correct, the remedy they seek would merely compound the wrong, and negate the policy of allowing individuals and new political parties a place upon the ballot in the State of Illinois.

The plaintiffs ask that the requirement of 200 signatures from 50 counties be declared unconstitutional but that the requisite of the signatures of 25,000 qualified voters should stand in its original form. (Appt. Br., p. 20).

If the requirement of obtaining 200 signatures in 50 counties was declared unconstitutional as debasing the

vote of those in the larger counties under the constitutional doctrine of "one man, one vote" and it merely required the obtaining of 25,000 signatures, a new political party or independent candidate could be nominated by approximately half of 1% of the number who voted in the last general election who may live in one county in a distinct corner of the state rather than by the present 6.6%. The debasement of the voters in the larger counties would be of an even greater disparity.

In *MacDougall* v. *Green*, 335 U.S. 281 the dissent stated in part (P. 289):

> It is not enough to say that this law can stand that test because it is designed to require statewide support for the launching of a new political party rather than support from a few localities. There is no attempt here, as I have said, to make the required signatures even approximately proportionate to the distribution of voters among the various counties of the state. No such proportionate allocation could of course be mathematically exact. Nor would it be required. But when, as here, the law applies a rigid, arbitrary formula to sparsely settled counties and justify giving greater weight to the individual votes of one group of citizens than to those of another group.

If the principles stated therein were applied to the legislation in question, it would create the situation where a new political party or an individual would be required to seek an approximate proportionate amount of signatures in each of the 102 counties of the state and thus perhaps create invidious discrimination as discussed in *Williams* v. *Rhodes*, 86 S. Ct. 3

If a population proportion of the signatures are required to be garnered from each of the 102 counties, then the

declaration that the 1935 Amendment is unconstitutional would by necessity require a similar holding as to the 25,000 requirement as creating an invidious discrimination. This would create the anomaly that there would be no legislative method for a new political party or individual to be nominated and receive a place on the printed ballot at a general election.

The defendants snbmit that the principles of "one-man, one-vote," do not apply for the reasons stated herein, and that the statute in question does not create an undue burden to amount to invidious discrimination against one seeking to run for public office.

In addition thereto the 1935 Amendment to Section 10-3 should be declared valid for following the plaintiff's argument to its logical conclusion would only create chaos and defeat the intent and purpose of the statutes attempting to provide a reasonable means to allow new political parties and individuals to obtain a place on the printed ballot in a general election.

CONCLUSION

For the reasons urged above, it is respectfully submitted that the decision of the United States District Court for the Northern District of Illinois be affirmed.

Respectfully submitted,

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APPENDIX

The Election Code, Illinois Revised Statutes, 1967 Chapter 46.

An Act Concerning Elections:

Article 7. The Making of Nominations by Political Parties:

7—1. Application of this Article.] § 7-1. Except as herein otherwise provided, the nomination of all candidates for all elective State, congressional, county, city, village and incorporated town and municipal officers, clerks of the Appellate Courts, trustees of sanitary districts, township officers in townships of over 5,000 population co-extensive with or included wholly within cities or villages not under the commission form of government, township officers in townships of 7,500 or more population adjacent to cities of 75,000 or more population, and for the election of precinct, township, ward and State central committeemen, and delegates and alternate delegates to National nominating conventions by all political parties, as defined in Section 7—2 of this Article 7, shall be made in the manner provided in this Article 7, and not otherwise. The nomination of candidates for electors of President and Vice-President of the United States, and trustees of the University of Illinois, and the election of delegates and alternate delegates-at-large to National nominating conventions, shall be made only in the manner provided for in Section 7—9 of this Article. This Article 7 shall not apply to the nomination of Associate,

Circuit, Appellate and Supreme Court judges, or to the nomination of candidates for school elections and township elections, except in those townships hereinabove specifically mentioned, or to the nomination of park commissioners in park districts, organized under "The Park District Code", approved July 8, 1947, as heretofore and hereafter amended, or to the nomination of officers of cities and villages organized under special charters, or to nomination of municipal officers for cities, villages, and incorporated towns with a population of 5,000 or less. The words "township officers", or "township offices", shall be construed, when used in this Article, to include supervisors and assistant supervisors.

In cases where Representatives in the General Assembly are required by Section 8 of Article IV of the Constitution to be nominated and elected from the State at large in the year 1964, such nomination shall be made in the manner provided in Article 8A.

7—2. Political parties defined—Percentage of vote—Un-American organizations.] § 7-2. A political party, which at the general election for State and county officers then next preceding a primary, polled more than 5 per cent of the entire vote cast in the State, is hereby declared to be a political party within the State, and shall nominate all candidates provided for in this Article 7 under the provisions hereof, and shall elect precinct, township, ward and State central committeemen as herein provided.

A political party, which at the general election for State and county officers then next preceding a primary, cast more than 5 per cent of the entire vote cast within any congressional district, is hereby declared to be a political party within the meaning of this Article, within such congressional district, and shall nominate its candidate for Representative in Congress, under the provisions

hereof. A political party, which at the general election for State and county officers then next preceding a primary, cast more than 5 per cent of the entire vote cast in any county, is hereby declared to be a political party within the meaning of this Article, within said county, and shall nominate all county officers in said county under the provisions hereof, and shall elect precinct, township, and ward committeemen, as herein provided;

A political party, which at the municipal election for city, village or incorporated town officers then next preceding a primary, cast more than 5 per cent of the entire vote cast in any city or village, or incorporated town is hereby declared to be a political party within the meaning of this Article, within said city, village or incorporated town, and shall nominate all city, village or incorporated town officers in said city or village or incorporated town under the provisions hereof to the extent and in the cases provided in section 7—1.

A political party, which at the municipal election for town officers then next preceding a primary, cast more than 5 per cent of the entire vote cast in said town, is hereby declared to be a political party within the meaning of this Article, within said town, and shall nominate all town officers in said town under the provisions hereof to the extent and in the cases provided in section 7—1.

A political party, which at the municipal election in any other municipality or political subdivision, (except townships and school districts), for municipal or other officers therein then next preceding a primary, cast more than 5 per cent of the entire vote cast in such municipality or political subdivision, is hereby declared to be a political party within the meaning of this Article, within said municipality or political subdivision, and shall nominate

all municipal or other officers therein under the provisions hereof to the extent and in the cases provided in section 7—1.

Provided, that no political organization or group shall be qualified as a political party hereunder, or given a place on a ballot, which organization or group is associated, directly or indirectly, with Communist, Fascist, Nazi or other un-American principles and engages in activities or propaganda designed to teach subservience to the political principles and ideals of foreign nations or the overthrow by violence of the established constitutional form of government of the United Statees and the State of Illinois.

7—3. Political parties, determination of total vote.] § 7-3. In determining the total vote of a political party, whenever required by this Article 7, the test shall be the total vote cast by such political party for its candidate who received the greatest number of votes; provided however, that in applying this section to the vote cast for any candidate for an office for which cumulative voting is permitted, the total vote cast for such candidate shall be divided by that number which equals the greatest number of votes that could lawfully be cast for such candidate by one elector.

7—4. Definitions.] § 7-4. The following words and phrases in this Article 7 shall, unless the same be inconsistent with the context, be construed as follows:

1. The word "primary" the primary election provided for in this Article.

2. The definition of terms in Section 1—3 of this Act shall apply to this Article.

3. The word "precinct" a voting district heretofore or hereafter established by law within which all qualified electors vote at one polling place.

4. The words "state office" or "state officer," an office to be filled, or an officer to be voted for, by qualified electors of the entire state, including United States Senator and Congressman at large, but not including Representatives in the General Assembly to be elected from the State at large in the year 1964 in accordance with Article 8A.

5. The words "congressional office" or "congressional officer", representatives in Congress.

6. The words "county office" or "county officer," includes an office to be filled or an officer to be voted for, by the qualified electors of the entire county. "County office" or "county officer" also include the assessor and board of appeals and county commissioners and president of county board of Cook County.

7. The words "city office" and "village office," and "incorporated town office" or "city officer" and "village officer", and "incorporated town officer" an office to be filled or an officer to be voted for by the qualified electors of the entire city, village or incorporated town, as the case may be, including aldermen.

8. The words "town office" or "town officer", an office to be filled or an officer to be voted for by the qualified electors of an entire town.

9. The words "town" and "incorporated town" shall respectively be defined as in Section 1—3 of this Act.

7—5. Dates for holding primaries—More than one candidate required—Hours polls shall be open.] § 7-5. A primary shall be held on the second Tuesday in June in every year in which officers are to be voted for on the

first Tuesday after the first Monday in November of such year, for the nomination of candidates for such offices as are to be voted for at such November election.

A primary for the nomination of such officers as are to be voted for on the first Tuesday in April of any year, shall be held on the second Tuesday in February of such year, except that in cities of 500,000 or more population such primary shall be held on the last Tuesday in February of such year.

A primary for the nomination of such officers as are to be voted for on the third Tuesday in April of any year, shall be held on the last Tuesday in February of such year.

A primary for the nomination of all other officers, nominations for which are required to be made under the provisions of this Article, shall be held 7 weeks preceding the date of the general or municipal election for such officers respectively.

No primary shall be held where the name of not more than one person of each political party is entitled to be printed on the primary ballot as a candidate for the nomination for each office to be filled at an election at which no other offices are to be voted on.

The polls shall be open from 6:00 a. m. to 6:00 p. m. As amended by act approved July 7, 1965. L. 1965, p. 1272.

7—6. Expenses of primary.] § 7-6. The expense of conducting each primary, including the per diem of judges, furnishing, warming, lighting and maintaining the polling place, and all other expenses necessarily incurred in the preparation for or conducting such primary shall be paid in the same manner, and by the same authorities

or officers respectively as in the case of general elections or municipal elections.

* * * * * *

7—9. County central committee—County convention—State conventions—Nomination of Presidential Electors.] § 7-9. On the second Monday next succeeding the June primary at which committeemen are elected, the county central committee of each political party shall meet at the county seat of the proper county and proceed to organize by electing from its own number a chairman and either from its own number, or otherwise, such other officers as said committee may deem necessary or expedient. Such meeting of the county central committee shall be known as the county convention.

The chairman of each county commitee shall within 10 days after the organization, forward to the Secretary of State, the names and post office addresses of the officers, precinct committeemen and representative committeemen elected by his political party.

The county convention of each political party shall choose delegates to the State convention of its party; but in any county having within its limits any city having a population of 200,000, or over the delegates from such city shall be chosen by wards, the ward committeemen from the respective wards choosing the number of delegates to which such ward is entitled on the basis prescribed in paragraph (e) of this section, such delegates to be members of the delegation to the State convention from such county. In all counties containing a population of 500,000 or more outside of cities having a population of 200,000 or more, the delegates from each of the townships or parts of townships as the case may be shall be chosen by townships or parts of townships as the case may be, the township committeemen from the respective

townships or parts of townships as the case may be choosing the number of delegates to which such townships or parts of townships, as the case may be are entitled, on the basis prescribed in paragraph (e) of this section, such delegates to be members of the delegation to the State convention from such county.

(b) All State conventions shall be held on the first Friday after the second Monday next succeeding the June primary at which committeemen are elected. The State convention of each political party shall have power to make nominations of candidates of its political party for the electors of President and Vice-President of the United States and for trustees of the University of Illinois, and to adopt any party platform, and to choose and select delegates and alternate delegates at large to national nominating conventions.

(c) The chairman and secretary of each State convention shall, within 2 days thereafter, transmit to the Secretary of State of this State a certificate setting forth the names and addresses of all persons nominated by such State convention for election of President and Vice-President of the United States, and for trustees of the University of Illinois, and for delegates and alternate delegates at large to national nominating conventions; and the names of such candidates so chosen by such State convention for electors of President and Vice-President of the United States, and trustees of the University of Illinois shall be caused by the Secretary of State to be printed upon the official ballot at the general election, in the manner required by law, and shall be certified to the various county clerks of the proper counties in the manner as provided in Section 7—60 of this Article 7 for the certifying of the names of persons nominated by any party

for State offices; provided, that if and as long as this Act prescribes that the names of such electors be not printed on the ballot, then the names of such electors shall be certified in such manner as may be prescribed by the parts of this Act applicable thereto.

(d) Each convention may perform all other functions inherent to such political organization and not inconsistent with this Article.

(e) At least 33 days before the June primary at which committeemen are elected, the chairman of the State committee of each political party shall file in the office of the county clerk in each county of the State a call for the State convention. Said call shall state, among other things, the time and place (designating the building or hall) for holding the State convention. Such call shall be signed by the chairman and attested by the secretary of the committee. In such convention each county shall be entitled to one delegate for each 500 ballots voted by the primary electors of said party in such county at the June primary to be held next after the issuance of such call; and if in such county, less than 500 ballots are so voted or if the number of ballots so voted is not exactly a multiple of 500, there shall be one delegate for such group which is less than 500, or for such group representing the number of votes over the multiple of 500, which delegates shall have 1/500 of one vote for each primary vote so represented by him. The call for such convention shall set forth this paragraph (e) of Section 7-9 in full and shall direct that the number of delegates to be chosen be calculated in compliance herewith and that such number of delegates be chosen.

(f) All precinct, township and ward committeemen when elected as herein provided shall serve as though

elected at large irrespective of any changes that may be made in precinct, township or ward boundaries and the voting strength of each committeeman shall remain as herein provided for the entire time for which he is elected.

(g) The officers elected at any convention, hereinbefore provided for, shall serve for a term of 2 years.

(h) A special meeting of any central committee may be called by the chairman, or by not less than 25% of the members of such committee, by giving 5 days notice to members of such committee in writing designating the time and place at which such special meeting is to be held and the business which it is proposed to present at such special meeting.

(i) Except as otherwise provided in this Act, whenever a vacancy exists in the office of precinct committeeman because no one was elected to that office or for any other reason, the chairman of the county central committee of the appropriate political party may fill the vacancy in such office by appointment and the appointed precinct commiteeman shall serve as though elected.

* * * * *

10—1. Article limited to minor Political Parties and groups—Certificates of nomination.] § 10-1. Political parties as hereinafter defined and individual voters to the number and in the manner hereinafter specified may nominate candidates for public offices whose names shall be placed upon the ballot to be furnished, as hereinafter provided: However, no nominations (except of candidates for township and school district offices and offices of cities, villages and incorporated towns with a population of less than 5,000) may be made under the provisions of this Article 10 by any established political party which at the general election next preceding, polled more than 5% of the entire vote cast in the State, or in the electoral

district for which the nomination is made. Those nominations provided for in Section 1 of Article VI—A of "An Act to revise the law in relation to township organization", approved March 4, 1874, as amended, shall be made as therein prescribed for nominations by established political parties, but minor political parties and individual voters are governed by this Article. Any convention, caucus or meeting of qualified voters of any established political party as herein defined may make one nomination for each office therein to be filled at any election, for officers of such township, city, village or incorporated town, by causing a certificate of nomination to be filed with the clerk of such township, city, village or incorporated town. Every such certificate of nomination shall state such facts as are required in Section 10—5 of this Article, and shall be signed by the presiding officer and by the secretary of the convention, caucus or meeting, who shall add to their signatures, their places of residence. Such certificates shall be sworn to by them to be true to the best of their knowledge and belief, and a certificate of the oath shall be annexed to the certificate of nomination.

Only those voters who reside within the electoral district for which the nomination is made shall be permitted to vote or take part in the proceedings of any convention, caucus or meeting of individual voters or of any political party held pursuant to the provisions of this Section. No voter shall vote or take part in the proceedings of more than one convention, caucus or meeting to make a nomination for the same office.

No person is eligible to vote at any convention, caucus or meeting of any political party for the nomination of candidates for township offices unless he is a registered voter in the township and is affiliated with that party;

each person voting shall sign an affidavit that he is a registered voter and affiliated with the party holding such convention, caucus or meeting.

10—2. "Political party" and "established party" defined—Formation of new party—Petition—Provisional organization—Committeemen.] § 10-2. The term "political party," as hereinafter used in this Article 10, shall mean any "established political party," as hereinafter defined and shall also mean any political group which shall hereafter undertake to form an established political party in the manner provided for in this Article 10: Provided, that no political organization or group shall be qualified as a political party hereunder, or given a place on a ballot, which organization or group is associated, directly or indirectly, with Communist, Fascist, Nazi or other un-American principles and engages in activities or propaganda designed to teach subservience to the political principles and ideals of foreign nations or the overthrow by violence of the established constitutional form of government of the United States and the State of Illinois.

A political party which, at the last general election for State and county officers, polled for its candidate for Governor more than 5% of the entire vote cast for Governor, is hereby declared to be an "established political party" as to the State and as to any district or political subdivision thereof.

A political party which, at the last election in any congressional district, senatorial district, county, township, school district, park district, municipality or other district or political subdivision of the State, polled more than 5% of the entire vote cast within such congressional district, senatorial district, county, township, school dis-

trict, park district, municipality, or political subdivision of the State, where such district, political subdivision or municipality, as the case may be, has voted as a unit for the election of officers to serve the respective territorial area of such district, political subdivision or municipality, is hereby declared to be an "established political party" within the meaning of this Article as to such district, political subdivision or municipality.

Any group of persons hereafter desiring to form a new political party throughout the State, or in any political subdivision greater than a county and less than the State, shall file with the Secretary of State a petition, as hereinafter provided; and any such group of persons hereafter desiring to form a new political party, in any county shall file such petition with the county clerk; and any such group of persons hereafter desiring to form a new political party in any municipality or district less than a county shall file such petition with the clerk or Board of Election Commissioners of such municipality or district, as the case may be. Any such petition for the formation of a new political party throughout the State, or in any such district or political subdivision, as the case may be, shall declare as concisely as may be the intention of the signers thereof to form such new political party in the State, or in such district or political subdivision; shall state in not more than 5 words ~~the~~ name of such new political party; shall contain a complete list of candidates of such party for all offices to be filled in the State, or such district or political subdivision as the case may be, at the next ensuing election then to be held; and, if such new political party shall be formed for the entire State, shall be signed by not less than 25,000 qualified voters: Provided, that included in the aggregate total of 25,000 signatures are the signatures of 200 qualified voters from each of at

least 50 counties within the State. If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area.

The filing of such petition shall constitute the said political group a new political party, for the purpose only of placing upon the ballot at such next ensuing election said list of party candidates for offices to be voted for throughout the State, or for offices to be voted for in such district or political subdivision less than the State, as the case may be under the name of and as the candidates of such new political party. If, at such ensuing election, the candidates of said new political party, or any candidate or candidates of said new political party shall receive more than 5% of all the votes cast at such election, in the State, or in any district or political subdivision of the State, as the case may be, then and in that event, such new political party shall become an established political party within the State or within such district or political subdivision less than the State, as the case may be, in which such candidate or candidates received more than 5% of the votes cast and shall thereafter nominate its candiates for public offices to be filled in the State, or such district or political subdivision of the State, as the case may be, under the provisions of the laws regulating the nomination of candidates of established political parties at primary elections and political party conventions, as now or hereafter in force.

Any such petition shall be filed at the same time and shall be subject to the same requirements and to the same provisions in respect to objections thereto and to any hearing or hearings upon such objections that are hereinafter in this Article 10 contained in regard to the nomination of any other candidate or candidates by petition. If any such new political party shall become an "established political party" in the manner herein provided, the candidate or candidates of such new political party nominated by the petition hereinabove referred to for such initial election, shall have power to select any such party committeeman or committeemen as shall be necessary for the creation of a provisional party organization and provisional managing committee or committees for such party within the State, or in any district or political subdivision in which said new political party has become established; and said party committeeman or committeemen so selected shall constitute a provisional party organization for said new political party and shall have and exercise the powers conferred by law upon any party committeeman or committeemen to manage and control the affairs of such new political party until the next ensuing primary election at which said new political party shall be entitled to nominate and elect any party committeeman or committeemen in the State, or in such district or political subdivision under any parts of this Act relating to the organization of political parties.

10—3. Independent candidates—Nomination papers.] § 10-3. Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State;

Provided, however, that included in the aggregate total of 25,000 signatures are the signatures of 200 qualified voters from each of at least 50 counties within the State. Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political division, equaling not less than 5%, nor more than 8% of the number of persons, who voted at the next preceding general election in such district or political sub-division in which such district or political sub-division voted as a unit for the election of officers to serve its respective territorial area; provided, that the maximum number of voters signing such petition may be increased to 25 whenever such amount is greater than the 8% limit hereinabove specified. If no previous general election has been held in a library district for which nominations are being made, such nomination papers shall be signed by not less than 25 qualified voters. Each voter signing a nomination paper shall add to his signature his place or residence, and each voter may subscribe to one nomination for such office to be filled, and no more: Provided that the name of any candidate whose name may appear in any other place upon the ballot shall not be so added by petition for the same office.

ARTICLE 21. ELECTORS OF PRESIDENT AND VICE-PRESIDENT OF UNITED STATES

21—1. Manner of choosing Presidential electors—Names of candidates to apear on ballot—Contests—Vacancies.] § 21-1. Choosing and election of electors of President and Vice-President of the United States shall be in the following manner:

(a) In each year in which a President and Vice-President of the United States are chosen, each political party or group in this State shall choose by its State Convention electors of President and Vice-President of the United States and such State Convention of such party or group shall also choose electors at large, if any are to be appointed for this State and such State Convention of such party or group shall by its chairman and secretary certify the total list of such electors together with electors at large so chosen to the Secretary of State of Illinois.

The filing of such certificate with said Secretary of State, of such chossing of electors shall be deemed and taken to be the choosing and selection of the electors of this State, if such party or group is successful at the polls as herein provided in choosing their candidates for President and Vice-President of the United States.

(b) The names of the candidates of the several political parties or groups for electors of President and Vice-President shall not be printed on the official ballot to be voted in the election to be held on the day in this Act above named. In lieu of the names of the candidates for such electors of President and Vice-President, immediately under the appellation of party name of a party or group in the column of its candidates on the

official ballot, to be voted at said election first above named in section 2—1, there shall be printed within a bracket the name of the candidate for President and the name of the candidate for Vice-President of such party or group with a square to the left of such bracket. Each voter in this State from the several lists or sets of electors so chosen and selected by the said respective political parties or groups, may choose and elect one of such lists or sets of electors by placing a cross in the square to the left of the bracket aforesaid of one of such parties or groups. Placing a cross within the square before the bracket enclosing the names of President and Vice-President shall not be deemed and taken as a direct vote for such candidates for President and Vice-President, or either of them, but shall only be deemed and taken to be a vote for the entire list or set of electors chosen by that political party or group so certified to the Secretary of State as herein provided. Voting by means of placing a cross in the appropriate place preceding the application or title of the particular political party or group, shall not be deemed or taken as a direct vote for the candidates for President and Vice-President, or either of them, but instead to the Presidential vote, as a vote for the entire list or set of electors chosen by that political party or group so certified to the Secretary of State as herein provided.

(c) Such certification by the respective political parties or groups in this State of electors of President and Vice-President shall be made to the Secretary of State within two (2) days after such State convention.

(d) Should more than one certificate of choice and selection of electors of the same political party or group be filed by contesting conventions or contesting groups, it shall be the duty of the State Electoral Board within ten

(10) days after the adjournment of the last of such conventions to meet in the office of the Governor and determine which set of nominees for electors of such party or group was chosen and selected by the authorized convention of such party or group. The Secretary of State shall notify the members of the electoral board of the date, time and place of such meeting. At such meeting a majority of the said members present, after notice to the chairman and secretaries or managers of the conventions or groups and after a hearing shall determine which set of electors was so chosen by the authorized convention and shal so announce and publish the fact, and such decision shall be final and the set of electors so determined upon by the electoral board to be so chosen shall be the list or set of electors to be deemed elected if that party shall be successful at the polls, as herein provided.

(e) Should a vacancy occur in the choice of an elector in a congressional district, such vacancy may be filled by the executive committee of the party or group for such congressional district, to be certified by such committee to the Secretary of State of Illinois. Should a vacancy occur in the office of elector at large, such vacancy shall be filled by the State committee of such political party or group, and certified by it to the Secretary of State of Illinois. As amended by act approved June 22, 1951. L.1951, p. 468.

SUPREME COURT OF THE UNITED STATES

No. 620.—October Term, 1968.

James L. Moore et al., Appellants, *v.* Richard B. Ogilvie, etc., et al.	On Appeal From the United States District Court for the Northern District of Illinois.

[May 5, 1969.]

Mr. Justice Douglas delivered the opinion of the Court.

This is a suit for declaratory relief and for an injunction, 28 U. S. C. §§ 2201, 2202, brought by appellants who are independent candidates for the offices of electors of President and Vice President of the United States from Illinois. The defendants or appellees are members of the Illinois Electoral Board. Ill. Rev. Stat. c. 46, §§ 7–14. In 1968 appellants filed with appellees petitions containing the names of 26,500 qualified voters who desired that appellants be nominated. The appellees ruled that appellants could not be certified to the county clerks for the November 1968 election because of a proviso added in 1935 to an Illinois statute requiring that at least 25,000 electors sign a petition to nominate such candidates. The proviso reads:

> ". . . that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties." Ill. Rev. Stat. 1967, c. 46, § 10–3.

A three-judge District Court was convened, 28 U. S. C. §§ 2281, 2284, which feeling bound by *MacDougall* v. *Green*, 335 U. S. 281, dismissed the complaint for failure

to state a cause of action. 293 F. Supp. 411. The case is here on appeal. 28 U. S. C. § 1253.

On October 8, 1968, the same day the case was docketed, appellants filed a motion to advance and expedite the hearing and disposition of this cause. Appellees opposed the motion. On October 14, 1968, we entered the following order:

> "Because of the representation of the State of Illinois that 'It would be a physical impossibilty for the State to effectuate the relief which the appellants seek,' the 'Motion to Advance and Expedite the Hearing and Disposition of this Cause' is denied. MR. JUSTICE FORTAS would grant the motion." 393 U. S. 814.

Appellees urged in a motion to dismiss that since the November 5, 1968, election has been held, there is no possibility of granting any relief to appellants and that the appeal should be dismissed. But while the 1968 election is over, the burden which *MacDougall* v. *Green*, *supra*, allowed to be placed on the nomination of nominees for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935. The problem is therefore "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 515. The need for its resolution thus reflects a continuing controversy in the federal-state area where our "one man-one vote" decisions have thrust. We turn then to the merits.

MacDougall v. *Green* is indistinguishable from the present controversy. The allegations in that case were that 52% of the State's registered voters were residents of Cook County alone, 87% were residents of the 49 most populous counties, and only 13% resided in the 53 least populous counties. The argument was that a nominat-

ing procedure so weighted violates the Equal Protection Clause.

Today, in contrast, 93.4% of the State's registered voters reside in the 49 most populous counties, and only 6.6% are resident in the remaining 53 counties. The constitutional argument, however, remains the same.

Five members of the Court held in *MacDougall* that a State has "the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former." 335 U. S., at 284. Three members of the Court dissented on the ground that the nominating procedure violated the Equal Protection Clause. One member of the Court voted not to exercise this Court's jurisdiction in equity to resolve the dispute.

While the majority cited *Colegrove* v. *Green*, 328 U. S. 549, as their authority for denying relief and while a few who took part in *Colegrove* put this type of question in the "political" as distinguished from the "justiciable" category, 328 U. S., at 552, that matter was authoritatively resolved in *Baker* v. *Carr*, 369 U. S. 186, 202. When a State makes classifications of voters which favor residents of some counties over residents of other counties, a justiciable controversy is presented. 369 U. S., at 198–204.

When we struck down the Georgia county-unit system in statewide primary elections, we said:

> "How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representa-

> tive is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment." *Gray* v. *Sanders*, 372 U. S. 368, 379.

Reynolds v. *Sims*, 377 U. S. 533, held that a State in an apportionment of state representatives and senators among districts and counties could not deprive voters in the more populous counties of their proportionate share of representatives and senators.

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U. S., at 555.

We have said enough to indicate why *MacDougall* v. *Green* is out of line with our recent apportionment cases. The use of nominating petitions by independents to obtain a place on the Illinois ballot is an integral part of her elective system. See *People* v. *Election Commissioners*, 221 Ill. 9, 18. All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote. *United States* v. *Classic*, 313 U. S. 299, 314–318; *Smith* v. *Allwright*, 321 U. S. 649, 664.

Dusch v. *Davis*, 387 U. S. 112, is not relevant to the problem of this case. There each councilman was required to be a resident of the borough from which he was elected. Like the residence requirement for state

senators from a multi-district county (*Fortson* v. *Dorsey*, 379 U. S. 433), the place of residence did not mark the voting unit; for in *Dusch* all the electors in the city voted for each councilman.

It is no answer to the argument under the Equal Protection Clause that this law was designed to require statewide support for launching a new political party rather than support from a few localities. This law applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights. The idea that one group can be granted greater voting strength than another is hostile to the one man-one vote basis of our representative government.

Under this Illinois law the electorate in 49 of the counties which contain 93.4% of the registered voters may not form a new political party and place its candidates on the ballot. Yet 25,000 of the remaining 6.6% of registered voters properly distributed among the 53 remaining counties may form a new party to elect candidates to office. This law thus discriminates against the residents of the populous counties of the State in favor of rural sections. It, therefore, lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.

MacDougall v. *Green* is overruled.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 620.—October Term, 1968.

James L. Moore et al., Appellants, v. Richard B. Ogilvie, etc., et al. | On Appeal From the United States District Court for the Northern District of Illinois.

[May 5, 1969.]

Mr. Justice Stewart, with whom Mr. Justice Harlan joins, dissenting.

I cannot join in the Court's casual extension of the "one voter, one vote" slogan to a case that involves neither voters, votes, nor even an ongoing dispute.

First of all, the case is moot. The appellants brought this action merely as prospective "candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois to be voted on at the general election to be held on November 5, 1968." But the 1968 election is now history, and no relief relating to its outcome is sought. In the absence of any assertion that the appellants intend to participate as candidates in any future Illinois election, the Court's reference to cases involving "continuing controversies" between the parties is wide of the mark. Cf. *Golden* v. *Zwickler*, 393 U. S. —. There simply remains no judicially cognizable dispute in this case. Since, however, the Court reaches a contrary conclusion, I shall indicate briefly the reasons for my disagreement with its holding on the merits.

The legislative apportionment cases, upon which the Court places its entire reliance, were decided on the theory that *voters* residing in "underrepresented" electoral districts were denied equal protection.

> "Overweighting and overvaluation of the votes of those living here has the certain effect of dilution

> and undervaluation of the votes of those living there." *Reynolds* v. *Sims*, 377 U. S. 533, 563.

In this case, by contrast, the appellants have sued merely as prospective candidates for office. They claim no impairment whatever of any interests they might have as voters; indeed, their complaint contains no allegation that any of them is in fact a qualified Illinois voter. Undeterred by the appellants' failure to explain how or as against whom they themselves are denied equal protection, however, the Court reaches out to hold that this statute "discriminates against the residents of the populous counties in the State in favor of rural sections." But since no "residents of the populous counties of the State" have asserted any rights, the Court's decision represents at best an advisory vindication of interests not involved in this case.

Even if the interests of voters in Illinois' "populous counties" were actually represented here, the Court's conclusion would still be completely unjustified. *Reynolds* v. *Sims*, *supra*, and its offspring at least involved situations in which the "debasement" or "dilution" of voting power found by the Court was the "certain" result of population variations among electoral districts. Under the Illinois statute now before us, however, no injury whatever is suffered by voters in heavily populated areas so long as their favored candidates are able to secure places on the ballot. And there is absolutely no indication in the record that the appellants could not, if they had made the effort, have easily satisfied Illinois' 50-county, 200-signature requirement. Indeed, there is no suggestion that the counties from which the appellants drew their support were "populous" rather than "rural." The rationale of *Reynolds* v. *Sims* simply does not control this case.

Any reliance by the Court on *Williams* v. *Rhodes*, 393 U. S. 23, would also be misplaced. That case involved an Ohio requirement that new political parties secure the support of over 433,000 persons—15% of the electorate—before their candidates could appear on the ballot. Here, the 25,000 signatures required by Illinois represent only about one-half of one percent of the total number of Illinois voters—a percentage requirement permissible, one would hope, under any view of the *Rhodes* case. Nor do the appellants make any showing that securing 200 signatures in less than half of the State's counties would be a burden at all comparable to that involved in *Williams* v. *Rhodes*.

The Court held in *MacDougall* v. *Green*, 335 U. S. 281, in sustaining the very statutory requirement here at issue,[1] that Illinois had pursued an "allowable State policy [of] requir[ing] that candidates for state-wide office should have support not limited to a concentrated locality." *Id.*, at 283. That conclusion seems to me to be no less sound today than it was at the time of the *MacDougall* decision.[2] Illinois' policy is, in fact, not at all unlike that upheld by the Court only two Terms ago in *Dusch* v. *Davis*, 387 U. S. 112, in which a district-residence requirement imposed upon municipal officers despite population variations among districts was never-

[1] *MacDougall* involved Ill. Rev. Stat., c. 46, § 10–2, relating to ballot position for candidates of new political parties; Ill Rev. Stat., c. 46, § 10–3, involved here, imposes identical signature requirements for independent candidates.

[2] While *MacDougall* involved candidates for various offices, the appellants here all sought election as Presidential Electors. See U. S. Const., Art. II, § 1:

"Each State shall appoint, *in such manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ." (Emphasis added.)

theless held proper as reasonably "reflect[ing] a detente between urban and rural communities . . . ." *Id.*, at 117. Cf. *Lucas* v. *Forty-fourth General Assembly*, 377 U. S. 713, 744 (STEWART, J., dissenting); *Reynolds* v. *Sims*, *supra*, at 589 (HARLAN, J., dissenting).

I respectfully dissent.